

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

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75-1317

In The
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

LLOYD DIXON, JR.,

Appellant.

Appeal From the United States District Court
For the Western District of New York

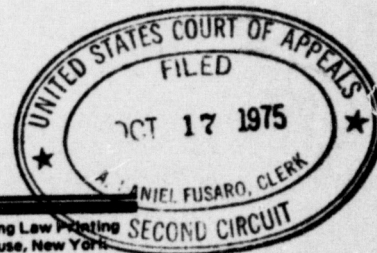
APPELLANT'S BRIEF

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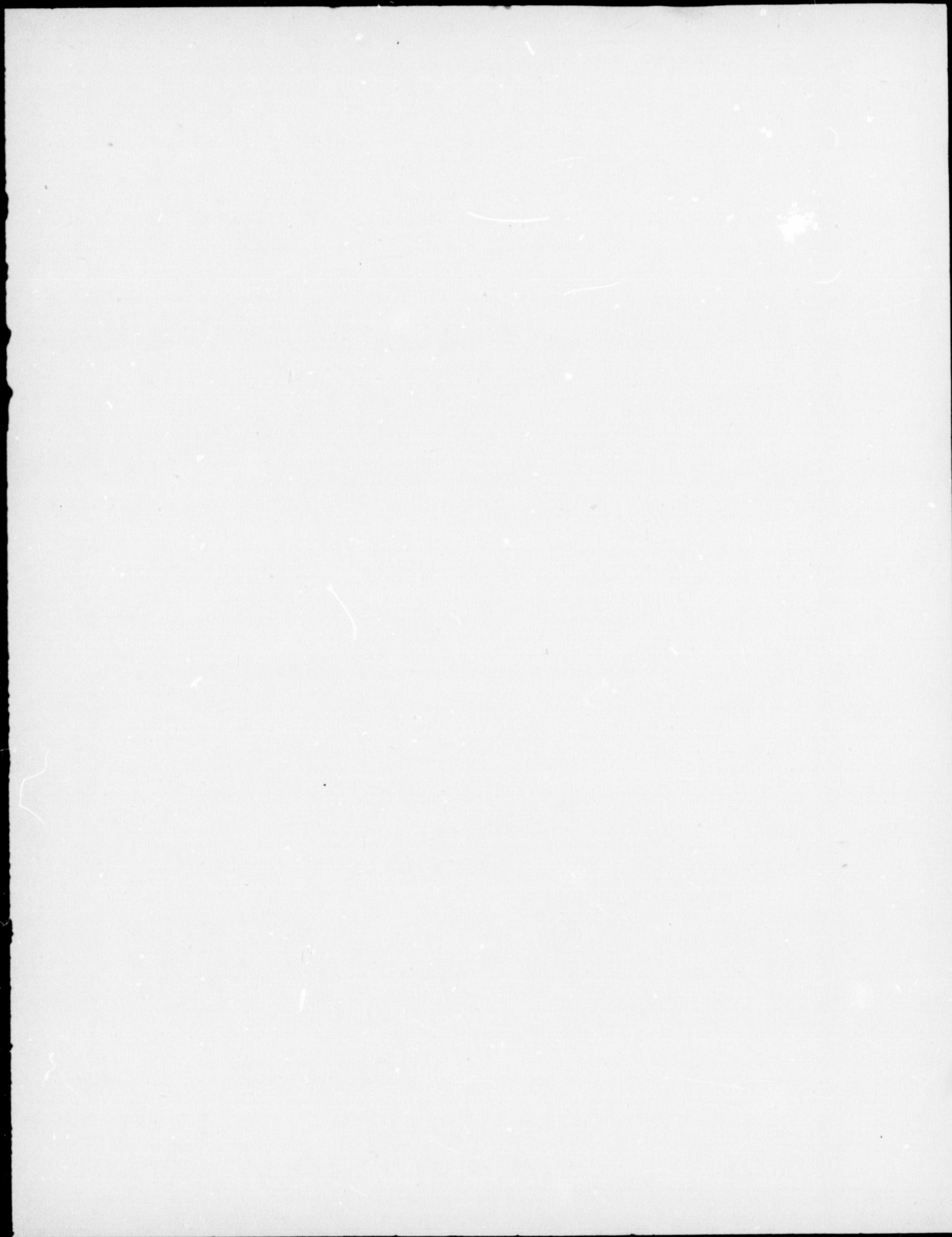


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Preliminary Statement

This case is about the former president of AVM,* Lloyd Dixon Jr., who was convicted in the Western District of New York on August 11, 1975 of conspiracy, mail fraud and SEC violations and sentenced to one year imprisonment. In essence, the indictment charged that the appellant failed to disclose personal loans from AVM on a proxy statement sent to shareholders.

The loans were not reported because Dixon had been advised by the company's auditors, Ernst & Ernst, that officers' loans did not have to be publicized if they were reduced below a certain amount at the "year's end." AVM's secretary-treasurer and financial director both understood the SEC rules to be a "year-end rule." Dixon, relying upon this advice, reduced his loans at the end of

* Automatic Voting Machine Corporation

1970 to \$14,600. The SEC rules provide that officers' loans must be reported on a 10-K and proxy statement if at any time during the year they exceed \$10,000 (proxy statement) and \$20,000 (10-K).

When the correct interpretation of the SEC rule was discovered, an independent inquiry was conducted for AVM by Arnold & Porter of Washington, D.C. After an intensive six-month investigation, this law firm reported to the SEC and the shareholders that the failure to disclose the president's loans was due to "a misunderstanding of the SEC rules." The loans were immediately repaid together with interest.

That is what this case is all about, except to say that a number of critical issues affecting the trial of SEC cases loom large in the wake of the judgment below. A notice of appeal was filed August 11, 1975. On the following page a chart illustrates the extent of the appellant's conviction and the penalties imposed.

Analysis of Conviction

<u>Count</u>	<u>Charge</u>	<u>Disposition</u>
I	Lloyd Dixon conspired with others to violate the SEC rules and the mail fraud statute by making false and fraudulent entries on the AVM books, in violation of §§371 and 2 of Title 18.	One year and \$10,000 fine
II	Lloyd Dixon solicited proxies by use of the mails in violation of §§ 240.14a-3 and 240.14a-101 of Title 17 of the Code of Federal Regulations.	One year and \$10,000 fine
III	On March 20, 1971, Lloyd Dixon committed mail fraud by soliciting proxies by mailing a proxy statement which omitted his loans in violation of §1341 of Title 18.	One year and \$1,000 fine
IV	On March 22, 1971, Lloyd Dixon committed mail fraud by soliciting proxies by mailing a proxy statement on March 22, 1971 which omitted his loans in violation of §1341 of Title 18.	One year and \$1,000 fine
V	On April 1, 1971, Lloyd Dixon committed mail fraud by soliciting proxies by mailing a proxy statement on April 1, 1971 which omitted his loans in violation of §1341 of Title 18.	One year and \$1,000 fine
VI	Lloyd Dixon filed a 10-K with the SEC which omitted his loans in violation of §§210.5-04 and 210.12-03 of Title 17 of the Code of Federal Regulations.	One year and \$10,000 fine
	The prison sentences were designated to run concurrently.	One year \$33,000 fine

STATUTES

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

REGULATIONS

The relevant SEC regulations are contained in the appendix to this brief.

Questions Presented

1. Was the evidence sufficient to sustain the appellant's conviction under each count of the indictment?
2. Did the court misinstruct the jury on the legal concept of reliance on professional advice?
3. Was the indictment multiplicitous?
4. Did the court misadvise the jury on the appellant's responsibility as president of AVM?

Statement of Facts

Although the trial of this case took only three days and the prosecution called only two witnesses, the issues are somewhat complex. A clear comprehension of the operation of AVM while Lloyd Dixon was at its helm is essential to an understanding of this case's important issues.

AVM's History

In 1958, when Lloyd Dixon was president of Rockwell Manufacturing Company, he handled the acquisition of AVM located in Jamestown, New York (G-1)*. In 1964, when Rockwell divested itself of AVM, through a "spin-off", Lloyd Dixon became its president and chief executive

* Government's exhibit No. 1 is AVM's Registration Certificate filed with the SEC prior to its becoming a public company. This certificate sets forth the entire history of AVM. AVM manufactures voting machines.

officer (19).

Under Lloyd Dixon's leadership AVM's profits soared from \$4 million in 1964 to \$43 million in 1972 (G-1). Its number of employees increased from 238 to 1,830 by 1970; and in that year, the shareholders received \$505,000 in dividends (G-1, G-70).** In 1965, AVM was approved as a public company by the SEC (20, 131). The persons who played prominent roles in this litigation should be identified with the positions they held in AVM:

Lloyd Dixon, Sr.
(Lloyd Dixon, Jr.'s father)

Chairman of the Board (87, 88)

Lloyd Dixon, Jr. ***

President (88)

* All record references are to our appendix unless otherwise indicated.

** G-70 is the Form 10-K filed for the fiscal year ending December 31, 1970.

*** Throughout this brief Lloyd Dixon, Jr. will be referred to as Lloyd Dixon or Dixon.

William Lewis

Secretary-Treasurer (19, 93)

Jack Lyons

Executive Vice President and
Director of Finance (93)

Kenneth Hammond

Assistant to Jack Lyons and former
employee of Ernst & Ernst (172)

Robert Entwisle

AVM's general counsel and a member
of its Board of Directors;
Entwisle's law offices are located
in Pittsburgh, Pennsylvania, and he
was in charge of preparing the proxy
statements (130, 136)

Ernst & Ernst

the nationally known firm of
certified public accountants who
were the independent auditors
selected by AVM's shareholders and
who prepared the 10-K and helped
with the proxy statements (132)

Sam Hale

a member of Ernst & Ernst who
serviced the AVM account during the
years 1964 through 1967. Hale told
Lewis and Dixon that the SEC rule
involved in this case was a "year-
end" rule (89-91)

We will now explain how each of these persons played an important part in the unfolding of the facts of this case.

Lloyd Dixon

Lloyd Dixon, who is 55 years old, married with two sons has had a distinguished career in both business and community service (253-255). Men such as W. F. Rockwell, Chairman of the Board of Rockwell International; A. J. Paddock, Vice President of United States Steel; Joseph Fuller, Assistant Treasurer of the State of Florida and other prominent businessmen and community leaders wrote letters on his behalf to Judge Curtin at the time of his sentencing (255).

Lloyd Dixon was involved in acquiring new properties for AVM and, consequently, was away from the Jamestown office for "extended" periods of time (86, 87). To accomodate his travel needs and other expenses, an

"advance account" was assigned to Lloyd Dixon (as well as other officers of AVM) which included both business-related expenses and advance loans to an officer for personal needs (76, 80-82).

According to AVM's charter, officers were allowed to borrow money from the company interest free and without shareholder or Board of Director approval (G-1)*. Personal loans were recorded in the officer's advance account together with items of expense (82, 83). No claim was ever made by the Government that Lloyd Dixon's loans were illegal, improper or unauthorized. All loans made to Lloyd Dixon were openly recorded on the books, journals and ledgers of AVM (82, 83). William Lewis, AVM's secretary-treasurer, stated that

* The corporate charter is attached to the registration certificate.

Lloyd Dixon never did or said anything which in any way indicated to him that the loans should not be openly and accurately reported (83).

Misunderstanding of SEC Rules

Since 1965 AVM used as its independent auditors the firm of Ernst & Ernst, a nationally known certified public accounting firm, experienced in dealing with SEC regulations (132). In 1967 Sam Hale, the partner of Ernst & Ernst in charge of the AVM account, learned that Lloyd Dixon's advance account exceeded the SEC limit of \$20,000 (90). At the end of each year Ernst & Ernst would prepare a confirmation slip showing how much each officer owed the company in his advance account (85, 86). Each year Dixon received a confirmation slip and signed it (86). Sam Hale brought this to the attention of William Lewis, the

secretary-treasurer of AVM (90, 103). After Hale told Lewis that Dixon's account had to be reduced below \$20,000 in order to comply with the SEC rules, he discussed the rule directly with Dixon (105). Lewis believed, as a result of these conversations with Hale, that if the loan accounts were reduced below \$20,000 at the year's end, there was compliance with the SEC provisions (90, 91, 121). In other words, if the account was under \$20,000 by the year's end, it did not have to be reported (121).* Significantly, when these conversations took place between Hale, Lewis and Dixon, the Government asked about whether they related to the proxy statement and/or the 10-K form. Lewis said he did not know for sure (103). Apparently, there may have been discussions about the proxy statement as well.

Robert Entwisle, AVM's general counsel and a member of its Board of Directors, was responsible for

* Section 210.5-04 provides that a loan to an officer that exceeds \$20,000 in a given year must be disclosed on a 10-K and §240.14a-101 requires the same procedure on a proxy statement if the borrowing is above \$10,000.

the preparation and filing of AVM's proxy statements (136). William Lewis, the secretary-treasurer, and Entwisle prepared the proxy statements which were sent to the shareholders (64, 141, 166).

Entwisle initiated the proxy statement's preparation by suggesting subjects that in his professional opinion should be incorporated in the statement (137, 164, 166). Lewis had the primary responsibility of supplying the needed information to Entwisle for the proxy statement (64, 94, 166).

It is important to know that Entwisle said that right after AVM went public, he met with Lewis, Hale and a Mr. Goodman from Ernst & Ernst to discuss the SEC rules concerning filing requirements (135). At that meeting they agreed upon a division of responsibility which began there and never changed (135). Dixon was not present at that conference.

Dixon's only connection with the preparation of the proxy statement was to review it and notify Entwisle whether there had been any change in the pension or thrift plans or ownership in AVM's shares (137, 138). He would occasionally inform Entwisle of these transactions so that they could properly be included in the statement (137, 138). Entwisle would then return to Pittsburgh, where his office was located, and would prepare a draft of the proxy statement which was returned to AVM for review (137, 138, 141). The only reason that Lloyd Dixon and other officers inspected the proxy statement proofs was to fill in various blanks left open by Entwisle to include the latest number of shares held by directors (137). The proxy statements were then mailed by the Mellon Bank of Pittsburgh to all shareholders (67). It is undisputed that Sam Hale, of Ernst & Ernst, William Lewis, AVM's secretary-treasurer, Jack Lyons, AVM's Finance Director, and Ken Hammond, a former employee of Ernst & Ernst working under Lewis,

all believed that the SEC loan disclosure provision was a "year-end" rule (90, 91, 156, 172).

Dixon's Loans

In 1965 Lloyd Dixon began borrowing from AVM in small amounts. As indicated earlier, these loans were authorized, were perfectly proper and fully disclosed on the AVM books (82, 83). Through the misunderstanding of the SEC rules, it was believed that the loans were not required to be reported if at the year's end they were reduced below \$20,000. Accordingly, Dixon was told beginning back in 1967 to reduce his loans at the end of each year to an amount below \$20,000 (103). Thus, Dixon each year would bring down his loans below the specified amount by borrowing funds from his bank in Jamestown and repaying AVM (22-63). Early in the next year, he would reborrow from AVM and repay the bank loan

(38, 39). In this fashion he understood he was complying with the SEC rules (156). Consequently, in 1970, the year of the indictment, Dixon lowered his loan account with AVM to \$14,600 (G-2)*. During that year AVM had in its checking account \$1,707,000, which, incidentally, was not drawing any interest (G-70)**. It was stipulated that Dixon borrowed during the year 1970 from AVM \$41,000 of which \$26,400 was repaid that same year.

Arnold & Porter's Investigation

Immediately after the discovery of a misunderstanding of the SEC rules concerning Dixon's loans

* G-2 is the general ledger, advance account of Lloyd Dixon designated as Account No. 2510. This ledger traces the history of Lloyd Dixon's financial transactions with AVM for the indictment year.

** G-70 is the Form 10-K filed for the fiscal year ending December 31, 1970 and contains Schedule F-3 which shows cash in the bank for the indictment year.

Entwisle launched an intensive investigation of the facts surrounding these transactions (162).

The prestigious law firm of Arnold & Porter, located in Washington, D.C., was engaged to supervise and direct this inquiry. Entwisle, who had previously been an Assistant Attorney General in the State of Pennsylvania, conducted extensive interviews of all persons who had anything to do with these loans (142, 143). Lloyd Dixon told him he was under a "misapprehension" about the SEC filing rules (143). Ken Hammond, a former Ernst & Ernst employee who was hired by AVM to assist them in their accounting procedures, explained that he believed that the SEC reporting rule was a "year-end rule" (172).

During the course of this investigation Entwisle and Dixon flew to Washington and met with Mitchell Rogovin* of the firm of Arnold & Porter to discuss this problem. While in Mr. Rogovin's office, Dixon was shown

* Mitchell Rogovin was the former Director of the Internal Revenue Service during the Kennedy Administration.

the SEC rule for the first time and stated "That is the first time I ever heard of that rule" (171).

Lloyd Dixon was able to fix the date of this meeting because his father passed away the following day (August 10, 1972) (170). Entwisle's diary shows a meeting in Rogovin's office at Arnold & Porter on August 9, 1972 (170).

Although Entwisle recalled the meeting and some of the conversation, curiously, he could not remember specifically whether Dixon said "That is the first time I ever knew of that rule" (171). However, he was quick to admit that it could well have been said by Lloyd Dixon (171).* These conversations in Mitchell

* Question: Now do you recall on that occasion Mr. Rogovin taking out the rule that pertained to disclosure of officer's loans on a proxy statement? Do you recall him taking that out and reading it to Mr. Dixon? Answer: I have no record of that, it could have happened. (170, 171)

Rogovin's office related to the proxy rule and indicate that Lloyd Dixon had no knowledge of that rule or its implications.

After a thorough and intensive investigation conducted by Entwisle and the firm of Arnold & Porter, a report was made to the SEC (an 8-K) in which the following statement was made as a result of their careful investigation:

"Due to a misunderstanding of the rule, the Company has failed to report publicly outstanding loans to two of its executives." (177)

A letter was sent to the shareholders dated January 17, 1973 in which the Board of Directors declared:

"The Company has been advised by the officers responsible for the preparation of the Proxy Statement and the Annual Report that for the loans and repayments thereof that they had

acted in the belief that they were complying with the regulations of the law." (159)

Dixon's Lack of Knowledge

The uncontroverted facts disclosed in this record point to the irresistible conclusion that Lloyd Dixon had been misadvised about the provisions of the SEC rules and regulations and had no knowledge of the actual reporting requirements provided in §§240.14a-3, 240.14a-101, or 210.5-04 of Title 17 of the Code of Federal Regulations. However, there are additional facts critical to the disposition of this appeal which should be disclosed to this Court. After appellant's conviction and in anticipation of his being sentenced, counsel arranged to have Dixon submit to a polygraph test conducted

by Richard O. Arther, one of the nation's leading polygraph experts.*

The District Court received this evidence under the authority of §78ff of Title 15 U.S.C. which provides that "No person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation." Mr. Arther certified to the court that Lloyd Dixon answered truthfully that in 1970 he did not know that he was obliged to report loans in excess of \$10,000 or \$20,000 if they were reduced below

* Richard O. Arther graduated with honors from Michigan State University in 1951 with a Bachelor of Science degree in Police Administration and obtained a Master of Arts degree in Psychology from Columbia University. Mr. Arther founded the Polygraph Examiners of New York State and has been its president and board chairman. He has served on the staff of the Graduate School of Public Administration of New York University and has taught at John Jay College of Criminal Justice. He has also served on the Police Science staff of Brooklyn College and instructed the New York Port Authority police on lie detection techniques. (Exhibit D of defendant's Sentencing Memorandum filed in the United States District Court for the Western District of New York)

that amount at year's end.*

At the time of sentencing, Lloyd Dixon explained to the Court:

* Questions asked of Mr. Dixon were as follows:

"1. Did Sam Hale tell you that to comply with regulations you had to get your advance account down to under \$20,000 at the year's end? Answer: Yes.

2. Before 1972, did you know you were supposed to report to the SEC every time your advance account was over \$20,000. Answer: No.

3. When the erroneous proxy statements were sent out, did you then know you were violating an SEC regulation? Answer: No.

4. Before 1972, did you know that every time your advance account was over \$10,000 it had to be mentioned on the next proxy statement? Answer: No"

(Exhibit A of defendant's Sentencing Memorandum filed in the United States District Court for the Western District of New York)

"Your Honor, I would only like to say that I never knowingly did anything illegal. I am not an accountant or a lawyer. I am an engineer by profession. I didn't know the law. The company had hired what we thought were good and able attorneys and accountants. My loans were always fully disclosed on the books of the company. The accountants knew about them. They evidently misinterpreted the rules also, and I did entirely rely on their advice. We always reported anything that we were told should be reported." (259)

Although the trial only lasted three days and the prosecution only presented two witnesses, Lewis and Entwisle, the jury deliberated for two days before returning a verdict of guilty on all counts. Despite the lack of evidence of any knowledge of Lloyd Dixon of these complex SEC rules, the Court sentenced him to one year imprisonment and imposed a fine in the amount of \$33,000.

POINT I

THE EVIDENCE IS INSUFFICIENT
TO SUPPORT THE VERDICT.

Appellant's conviction raises the gravest constitutional doubts. Even the most superficial examination of the record fails to yield any evidence showing that Lloyd Dixon knew of any rule which required the disclosure of his loans if the outstanding balance exceeded \$20,000 or \$10,000 at any time during the year. Furthermore, there is ample evidence showing that the auditors—Ernst & Ernst—specifically advised him that the "loan rule" was a "year-end rule" and not an aggregate one. Consequently, Dixon has become one more victim in an unending list of casualties strewn in the path of the dangerous doctrine of conspiracy and mail fraud.

The question dominating this appeal involves the sufficiency of the evidence concerning his unwarranted conviction—an issue which presents a continuing challenge to this Court. Since different legal considerations are involved in discussing the evidence concerning mail fraud, conspiracy, and the SEC violations, we have subdivided these three topics.

Mail Fraud

This Court in United States v. Baren, 305 F.2d 527 (2d Cir. 1962) set forth the basic elements that the government must prove beyond a reasonable doubt in any mail fraud prosecution:

"In every mail fraud case, there must be a scheme to defraud, representations known by defendants to be false and some person or persons must have been defrauded." (305 F.2d at 528)

In addition, the use of the mails must be an essential part of the scheme under §1341. Cf. United States v. Maze, 94 S.Ct. 645 (1974); Pereira v. United States, 347 U.S. 1 (1954); Kann v. United States, 323 U.S. 88 (1974).

It must be emphasized that this Court's formula is stated in the conjunctive form, meaning that there can be no successful prosecution under §1341 unless all three elements are satisfied. Here there was never any evidence disclosed showing any of these required elements.

First, there was no scheme to defraud. There was absolutely no evidence of Dixon forming any plan to trick the stockholders into executing their proxies in favor of AVM. Entwisle, the general counsel, claimed he was familiar

with the disclosure rule (161). If Dixon intended to execute a scheme to withhold information from the shareholders, he would not have fully exposed his borrowings from AVM. The record unmistakably indicates that the appellant's loans were frankly reported in AVM's books, open to every stockholder, director, and counsel (83).

Second, Dixon did not know that omitting his loans in the proxy statement was wrong; there is an abundance of evidence that he believed he was making accurate representations. Sam Hale advised the secretary-treasurer of AVM and Dixon that the disclosure rule was a "year-end rule" (90). For that matter, Hale, AVM's secretary-treasurer (Lewis), its financial director (Lyons), and Hammond (a former employee of Ernst & Ernst working in AVM's accounting department) all believed it was a "year-end rule" (90, 91, 156, 172).

Each year Dixon reduced his balance to what he understood was the legal limit, making acknowledgement of his indebtedness unnecessary. Obviously Dixon was trying to comply with what he understood the rule to be as evidenced by this pattern of mitigation. Had he known what

the true law was, he would have done nothing: no amount of reduction would have eliminated the need to divulge in the proxy statement and the 10-K his obligations to AVM. Clearly, Dixon had no knowledge of the proxy rule because it would have been just as easy for him to diminish his loans below \$10,000 as well as \$20,000. For instance, in 1970 he decreased his account to \$14,600. Had he known of the proxy rule, he could have easily lessened it by another \$4,600 to an amount under \$10,000.

Finally, no shareholders were defrauded. The statute imposes upon the Government the burden of showing that some actual harm or injury was contemplated by the scheme. United States v. Regent Office Supply Co., 421 F.2d 1174 (2d Cir. 1970). No shareholder was in any way misled into executing his or her proxy. There is absolutely no evidence that had Dixon reported his loans any shareholder would have voted his or her proxy differently.

Even if one were to urge that the mere receipt of an inadequate proxy statement is fraudulent (putting to one side that proof of this element alone is insufficient to sustain a charge under §1341) there still could be no

prosecution for a violation of the mail fraud statute. The reason is found in Post v. United States, 407 F.2d 319 (D.C. Cir. 1968) where the court stated:

"Active rather than constructive fraud is a prerequisite to conviction for mail fraud. Mere breach of a fiduciary obligation does not itself constitute active fraud; there must be specific intent to defraud." (407 F.2d 829)*

The case which most closely resembles our own is Epstein v. United States, 174 F.2d 754 (6th Cir. 1949) which deals with the distinction between constructive fraud and actual (or active) fraud. The court in Epstein held that a mail fraud prosecution can only be predicated upon proof of active or actual fraud (174 F.2d at 766). Actual fraud was defined as "intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end design" (184 F.2d at 765).

* Accord, United States v. Shavin, 287 F.2d 647 (7th Cir. 1961); Williams v. United States, 278 F.2d 535 (9th Cir. 1960); United States v. Kyle, 257 F.2d 559 (2d Cir. 1958), cert. denied, 358 U.S. 937 and Gardner v. United States, 358 U.S. 927 (1959); United States v. Brandt, 196 F.2d 653 (2d Cir. 1952); Epstein v. United States, 174 F.2d 754 (6th Cir. 1949); Shushan v. United States, 117 F.2d 110 (5th Cir. 1941); United States v. Koenig, 388 F.Supp. 670 (S.D.N.Y. 1974).

In Epstein, the corporate directors failed to disclose their interests in other firms from which the corporation was purchasing supplies at current market prices through the mails. The court held this did not amount to an actual fraud sufficient to sustain a charge under §1341. Rather, the court emphasized such activity resembles constructive fraud construed as:

" . . . a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." (174 F.2d at 766)

Clearly this case comes well within the reach of the Sixth Circuit's well-reasoned holding in Epstein. There is overwhelming evidence that Dixon misunderstood the SEC rules and that his failure to comply with their proper interpretation was a direct result of his reliance on his lawyer and accountants. Thus, according to the well-settled rule, "if the defendant's acts were done inadvertently, mistakenly, or in good faith without an intention to defraud, then the government has not sustained its burden of proof, and the defendant must be acquitted." United States v.

Sheiner, 273 F.Supp. 977, 982-83 (S.D.N.Y. 1967), aff'd, 410 F.2d 337 (2d Cir. 1969); United States v. Baren, 305 F.2d at 533.

In United States v. Guterma, 179 F.Supp. 420 (E.D.N.Y. 1959), annual reports mailed to shareholders failed to reveal certain facts concerning the corporation's purported sale of stock. The court held as a matter of law that this omission could not constitute a scheme to defraud under §1341.

These compelling authorities lead to the irresistible conclusion that the government, as a matter of law, did not sustain its burden of proof. The record below shrieks of Dixon's good faith and conscientious efforts to follow the advice of his auditors and lawyer.

SEC Counts

Counts two and six charged Dixon with the SEC violations. The court, in instructing the jury that the law required that Dixon acted "knowingly and willfully," advised:

"The word 'knowingly' means that the defendant must be aware of what he was doing and what he was not doing. The word 'willfully' under Counts [sic] 2 and Count 6 means that the defendant acted deliberately and intentionally and his acts, statements or omissions were not the result of innocent mistake, negligence or inadvertence or other innocent conduct." (313)

Later on the court instructed the jury:

"Unless and until outweighed by evidence in the case to the contrary, the presumption is that every person knows what the law forbids and what the law requires to be done. However, evidence that the accused acted or failed to act because of ignorance of the law is to be considered by you in determining whether or not the accused acted or failed to act with the intent as charged." (314)

Under this instruction the prosecution was obliged to prove that Dixon realized he was committing a wrongful act. United States v. Peltz, 433 F.2d 48 (2d Cir. 1970).

No proof was produced that the appellant ever read the SEC rules.* Sam Hale, of Ernst & Ernst, William Lewis, Jack Lyons, and Ken Hammond, a former employee of Ernst & Ernst, all understood the provision to be a "year-end rule" (90, 91, 156, 172).

And finally, after Arnold & Porter conducted a full and independent investigation of all the circumstances surrounding these loans, a report was made to the SEC and the shareholders that the loans were omitted due to "a misunderstanding of the rule" (177). These decisive disclosures demonstrate Dixon's manifest good faith. Under these compelling factors, it seems uncivilized to put Lloyd Dixon in jail and fine him \$33,000 for his misunderstanding of a provision that the auditors misinterpreted, the secretary-treasurer and other AVM personnel misconceived, and, in all probability, counsel misconstrued.

* The prosecution proved that in 1966 Lewis and Entwisle attended a two-day PLI seminar in New York City concerned with the famous Texas Gulf Sulphur case dealing with insider information (136). Dixon accompanied them (136). They only stayed for the first day of the conference and although there was some consideration of the proxy rules, Entwisle testified he had no idea which were discussed (168, 169). Pathetically, the Government attempted to use this slight brush with the rules some four years before as a basis of charging that Lloyd Dixon knew of the specific provisions applying to this case.

Conspiracy

A major question presented on this appeal is whether there was sufficient evidence to prove Lloyd Dixon's participation in a conspiracy to violate the SEC rules and the mail fraud statute. Not a shred of proof was adduced showing that he knew of or participated in any conspiracy. William Lewis, a prosecution witness and one of the two witnesses testifying, denied that there was any conspiracy to violate the SEC rules.*

The government failed to establish any unlawful agreement by anyone to violate the SEC rules or the mail fraud statute. United States v. Falcone, 311 U.S. 205 (1940), aff'g 109 F.2d 579 (2d Cir. 1940); United States v. Agueci, 310 F.2d 817 (2d Cir. 1962). It is well settled that the mere association with others who are charged as co-conspirators is insufficient to sustain a conspiracy conviction. United

* "Q. [D]id you ever at any time encompassed in the course of these proceedings, this indictment, did you ever at anytime [sic] conspire with Mr. Dixon or anyone else to use the mails to violate the SEC provisions?

"A. No, sir" (97, 98).

Although an objection to the question was sustained, the witness had completed his answer. It is submitted that the question was perfectly proper in a conspiracy case and the objection should have been overruled.

States v. Docherty, 468 F.2d 989 (2d Cir. 1972); United States v. Ragland, 375 F.2d 471 (2d Cir. 1967); United States v. Bentvena, 319 F.2d 916 (2d Cir. 1963). During the past several years this Court has struck down, as a matter of law, conspiracy convictions which were not supported by adequate evidence. In each of these cases the proof was far more compelling than that presented here. United States v. Freeman, 498 F.2d 569 (2d Cir. 1974); United States v. Infanti, 474 F.2d 522 (2d Cir. 1973); United States v. Terrell, 474 F.2d 872 (2d Cir. 1973); United States v. Fantuzzi, 463 F.2d 683 (2d Cir. 1972); United States v. Hysohion, 448 F.2d 343 (2d Cir. 1971); United States v. Steward, 451 F.2d 1203 (2d Cir. 1971).

In a case closely resembling ours, the Fifth Circuit reversed a conspiracy conviction of a lawyer who was convicted of mail fraud because of insufficient evidence of knowledge of any fraud. Milam v. United States, 322 F.2d 104 (5th Cir. 1963). There, Milam set up a loan company in Atlanta, Georgia and acted as its secretary-treasurer until it was turned over to other defendants. He drew the contracts that were used by the company salesmen

charged with perpetrating fraudulent loans. One of the "advanced fee" checks, which contained a restrictive endorsement, was deposited by Milam in his personal account. Milam assured borrowers that their loans were approved and told them he was unable to understand why they had not received their funds. These facts are far more damning than those upon which Lloyd Dixon was convicted of conspiracy.

In United States v. Docherty, 468 F.2d 989 (2d Cir. 1972), this Court overturned an attorney's conviction for conspiracy to defraud a federally insured bank, although Docherty actually signed the application for the loan. In reversing Docherty's conspiracy conviction and dismissing the indictment, this Court decided that the government failed to prove that he had agreed to willfully misapply bank funds or to defraud a bank officer.

In United States v. Crosby, 294 F.2d 928 (2d Cir. 1961), this Court overturned the conspiracy convictions of three stockbrokers where the government's evidence was insufficient to prove guilty knowledge of the sale of millions of unregistered securities.

This Court in Crosby, in a fierce opinion, wrote:

"The scanty extrinsic evidence produced by the government against these defendants implies guilt only if we first assume guilty knowledge and purpose; when used to prove that basic element of the crime it is neither substantial nor convincing." (294 F.2d at 942-943).

In Foster v. United States, 178 F. 165 (6th Cir. 1910), the mail fraud conspiracy conviction of a stockbroker, with a substantial proprietary interest in the brokerage firm, was reversed because there was insufficient evidence to establish the defendant's knowledge of the fraudulent schemes undertaken by certain partners of the brokerage house.

In the wake of this tidal wave of cases, Lloyd Dixon's conviction must be swept aside. The instant case illustrates better than any other the hazards inherent in a conspiracy prosecution. The need for strict adherence to the firm rules forged by this Court, impelled by a desire to shield the innocent from being unjustly convicted under this perilous doctrine, is here well demonstrated.

POINT II

THE COURT MISINSTRUCTED THE JURY
ON THE DEFENSE OF RELIANCE ON
PROFESSIONAL ADVICE.

The central theme of the appellant's defense was his genuine reliance upon the professional advice of his accountants and lawyer. Thus, the court's instructions to the jury on this rule of law achieved paramount importance. Although the accountants admittedly knew of the loans because each year Lloyd Dixon supplied signed confirmation slips to Ernst & Ernst, verifying his loans. Robert Entwisle, AVM's lawyer, tried to contend at the trial that he knew nothing of them. Since Entwisle bore the responsibility for preparing the proxy statement, his denial of knowledge of the loans played an important part in the court's charge on reliance on professional advice. Entwisle had to admit that he only asked William Lewis, AVM's secretary-treasurer, about any "transactions" between AVM and its officers (173). He conceded that when he asked about "transactions," he merely assumed that included loans (173). Thus, it became extremely important for the jury to understand where the duty lay to either volunteer such information or inquire about it.

Tracking this Court's decision in Haywood Lumber & Mining Co. v. Commissioner of Internal Revenue, 178 F.2d 769 (2d Cir. 1950), counsel asked the court to instruct the jury:

"To impute to the corporate officer the mistakes of his consultants would be to penalize him for consulting an expert, for if he must take the benefit of his counsel's or accountant's advice cum onere, then he must be held to a standard of care which is not his own and one which, in most cases, would be far higher than that exacted from a layman." [Thus, Lloyd Dixon had no duty to ask either, of his accountant or lawyer, whether or not these loans should be reported to the shareholders or the Securities and Exchange Commission.] (Defendant's Request No. 8, marked as a court exhibit; quoted portions taken directly from the Haywood Lumber case, 178 F.2d at 771).

Rejecting this requested instruction, the trial court instead charged:

"If the defendant sought advice of attorneys and accountants whom he considered competent and under the circumstances a reasonable person would find that they were competent, and before he took any action he made a full and active report to them of all the material facts of which he reasonably should have had knowledge and he acted in good faith for the purpose of securing advice on the lawfulness of his conduct. . . ." (218; emphasis added).

This instruction imposed upon the defendant the duty of supplying the loan information to counsel in direct defiance of this Court's ruling in Haywood.

Counsel specifically excepted to this portion of the court's charge and requested the court to instruct the jury:

"If it please your Honor, I would most respectfully except to that portion of your charge on reliance, professional reliance, how he must give them all the information. Your Honor, I think most respectfully, you repeated that three or four times, and I would request you charge the jury that he has a right to rely upon the lawyer or the accountant inquiring of him about information that may be relevant to their discharge of their duties. Your Honor, I say most respectfully that I think the jury has been left with the impression now that if a man doesn't give all this information almost spontaneously, concerning loans or any other information to the attorney or accountant, why, they have no obligation to advise him one way or the other" (248).

The defense was badly jolted by this misguided charge on the reliance on professional advice because it was woefully inadequate. This misinstruction imposed a cruel handicap on the appellant's defense. The magnitude

of this error places the case far beyond appellate redemption. Clearly, the court adopted a significantly higher standard for the defense than that required by the rigid regime of law carefully constructed by this circuit.

Although the case law dealing with this important subject is clustered around income tax litigation,* the reasons for the defense here are even more compelling than in a tax prosecution.

The decision which examines more carefully than any other this defense is Haywood Lumber & Mining Co. v. Commissioner, 178 F.2d 769 (2d Cir. 1950), where a taxpayer failed to file personal holding company returns. Since the Haywood case is remarkably similar to our own, a detailed discussion of the facts is appropriate. In Haywood, the company's secretary-treasurer requested that a CPA prepare the proper corporate tax returns. Although the CPA

* See, e.g., Bursten v. United States, 395 F.2d 976 (5th Cir. 1965); Burton Swartz Land Corp. v. Commissioner, 198 F.2d 558 (5th Cir. 1952); Bronson v. Commissioner, 183 F.2d 529 (2d Cir. 1950); Orient Inv. & Finance Co. v. Commissioner, 166 F.2d 601 (D.C. Cir. 1948); Hatfried, Inc. v. Commissioner, 162 F.2d 628 (3d Cir. 1947). See, also, 22 A.L.R.2d 972 (1952); 3 A.L.R. Fed. 665 (1970).

knew that the taxpayer was a personal holding company, he did not inform the secretary-treasurer of the need to file a personal holding company tax return. The secretary-treasurer was aware of the personal holding surtax statute but it did not occur to him that a holding company return had to be filed.

Because the secretary-treasurer did not specifically inquire of the CPA about the personal holding company status but merely awaited passively for such tax advice as the CPA might volunteer, the tax court held that petitioner failed to sustain the burden of proving that ordinary business care was exercised in omitting to file a personal holding company surtax return.

This Court, acting under the able leadership of Justice Swan, and joined in by Justices Learned Hand and Jerome Frank, concluded:

"Sprague [secretary-treasurer] had not 'awaited passively for such tax advice as Wolcott [CPA] might volunteer to give'; he affirmatively requested the preparation by his consultant of proper returns. To require Mr. Sprague to inquire specifically about the personal holding company act nullifies the very purpose of consulting an expert. We doubt if anyone would suggest that a client who stated the facts of his case to his lawyer must, in order to show

ordinary business care and prudence, inquire specifically about the applicability of various legal principles which may be relevant to the facts stated." (178 F.2d at 771; emphasis added)

The government must concede in this case that the independent auditors, Ernst & Ernst, were hired to prepare and file a proper 10-K as well as assist in the preparation of the proxy statements. Robert Entwisle, AVM's general counsel, was responsible for insuring that proper proxy statements were dispatched. Under Haywood's clear mandate, it was not for Lloyd Dixon, William Lewis or anyone else in AVM, to inquire whether or not these loans had to be reported on the 10-K or the proxy statement. It would be just as foolish to expect AVM's officers to ask whether the inordinate ownership of AVM shares must be reported or unusual acquisitions must be disclosed. To impose such a burden on laymen would in reality mean they would have to be familiar with the entire tangled SEC maze.

The loans were openly reported on the books and verified by Ernst & Ernst. Robert Entwisle, as a member of the Board of Directors, at the very least was charged with constructive knowledge of the loans. More importantly,

Entwisle admitted that he never asked about whether or not there were any "officers' loans." Section 240.14a-101 of Title 17 of the Code of Federal Regulations specifically distinguishes between "transactions" and "loans."

William Lewis, AVM's secretary-treasurer, was the officer charged with the responsibility for supplying all "necessary information" to Entwisle for use in preparing the proxy statements (64, 94, 166). Lewis relied on Sam Hale's expert advice that since Dixon's balance was less than \$20,000 at year's end, no disclosure on the 10-K or proxy statement was required.

To require Lewis or the appellant to inquire specifically of Entwisle about the disclosure rules runs counter to this Court's imposing language in Haywood. Such a proposal nullifies the very purpose of consulting an expert, especially since Lewis had been advised by Ernst & Ernst that these disclosures were unnecessary under their misunderstanding of the appropriate SEC rules (90, 91). Certainly, under all the circumstances of this case, it was reasonable to expect Robert Entwisle to inquire about officers' loans which are specifically spelled out in the SEC provisions as well as "transactions."

The appellant's reliance on professional advice in this case is stronger than in the ordinary tax litigation because Entwisle and Ernst & Ernst acted in the capacity of general counsel and the regular auditors of AVM, as compared to a tax consultant who is hired on a one-time basis to prepare a tax return. Entwisle, as general counsel and a member of the Board of Directors, had access to all corporate books and records and visited the plant on the average of once a month (165). Ernst & Ernst had been AVM's independent accountant from the time the corporation first became registered with the SEC (132). The auditors and counsel had established a long and strong working relationship with AVM. This continuing contact with the experts and AVM leads to the conclusion that Lloyd Dixon and AVM had every right to rely on their experts' counsel and advice. It was not even necessary, as in Haywood, for AVM personnel to request specifically the preparation of the proxy statements and the 10-K because these tasks were the normal responsibilities of Entwisle and Ernst & Ernst.

In light of these indisputable facts, i.e., Ernst & Ernst's knowledge of the loans and Entwisle's constructive knowledge, it was error for the court to misinstruct the jury that it was for their determination whether appellant had made a "full and accurate report to the experts of all material facts." The competency of Entwisle and Ernst & Ernst was undisputed as was their obligation to file the necessary SEC forms and proxy statements. Beyond that the officers of AVM had no further obligation. Since 1964 Entwisle and Ernst & Ernst had undertaken the responsibility of issuing proxy statements and 10-K forms in the ordinary course of their professional duties.

To suggest that Lloyd Dixon had a duty to furnish information of his loans so that they could be properly reported in view of the complexity of the SEC rules is preposterous. This region of the law, choked like a fever swamp with incomprehensible provisions and teeming with over 20,000 different rules and regulations, breeds misunderstanding and misinterpretation, as exempli-

fied by this case. Even lawyers and accountants, who assume the hazardous undertaking of guiding a client through these treacherous waters often become hopelessly lost in these shifting tides of the law.

Certainly this distressing dilemma, recognized by the Securities and Exchange Commission, provides the primary impulse for §78ff relieving one of imprisonment if it can be shown that he did not know of the existence of a particular rule. Accordingly, this crucial failure in the court's instructions requires a reversal of the appellant's conviction and the granting of a new trial.

POINT III

THE INDICTMENT WAS MULTIPLICITOUS

This appeal highlights a critical question concerning the propriety of the indictment. The defendant was charged in the second count of the indictment with using the mails to solicit proxies by the means of a proxy statement which omitted his loans, in violation of the SEC rules.

In counts three, four, and five, the defendant was charged with using the mails to solicit proxies, in violation of the SEC rules, by the means of a proxy statement which omitted his loans, in violation of the federal mail fraud statute.

The time included in count two of the indictment covers each of the episodes described in counts three, four, and five. Thus, the defendant was charged with exactly the same crime in four counts. Count two includes each of the offenses designated in counts three, four, and five—for the essence of this collection of offenses is that the defendant "by the use of the mails" solicited proxies by the means of a proxy statement which omitted his loans.

The vice of multiplicity is the charging of a single offense in multiple counts. Clearly, the indictment is multiplicitous and involves a misjoinder in violation of Rule 14 of the Federal Rules of Criminal Procedure. The virtue of this rule is that it lessens the probability of double punishment and the obloquy of multiple charges for the same alleged misconduct. North Carolina v. Pearce, 395 U.S. 711 (1969).

Counsel complained in advance of and during the trial about the misjoinder of these charges, contending that the defendant could not be convicted of both, but of only one episode designated in either count two or counts three, four, and five, but not both (86, 91, 92, 94).*

Thus, it was a cardinal error, reaching due process proportions, for the trial court to compel the appellant to proceed to trial under both sets of charges. The defendant is prejudiced in that the duplication of charges always magnifies his criminal liability in the eyes of the jury. Even though Dixon received concurrent sentences,

* On March 30, 1973 it was urged that the indictment should be dismissed because it was multiplicitous. Paragraphs 10 and 11 of the affidavit (under the subheading of "Inspection of Grand Jury Minutes Pursuant to Rule 6(e)) of Herald Price Fahringer, Esq. in support of motion to dismiss contain this complaint.

the convictions on all counts influenced the court, resulting in the imposition of a more severe sentence than had he only been convicted of the SEC regulations.*

The test applied by our courts to determine the number of separate criminal offenses that can be carved out of a single transaction has been stated as follows:

"Whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by statute." (In re Snow, 120 U.S. at 283, Bell v. United States, supra, 349 U.S. 81) **

In other words, if the same evidence is needed to convict for one offense as for the other, and there is no legislative intent indicating that separate and consecutive punishments could be imposed, there is only one offense that can be charged. Rayborn v. United States, 234 F.2d 368 (6th Cir. 1956).

* As indicated earlier, §78ff(a) provides a defendant should not be jailed if he can show that he had no knowledge of the rule that was violated.

** Quoted in 1A S. Bernstein, Criminal Defense Techniques §12.09 (1969).

The reason that the government should be required to elect among multiplicitous counts and the court should dismiss those which are superfluous is to promote an efficient trial and avoid the risk that "the prolix pleading may have some psychological effect upon the jury by suggesting to it that the defendant has committed not one but several crimes." United States v. Mamber, 127 F.Supp. 925, 927 (D. Mass. 1955).

In the instant action the evidence needed to convict for both sets of charges was identical. The whole case against the defendant dealt with the mere mailing of a proxy statement that omitted the loans to Lloyd Dixon. No other evidence of any kind was produced. Thus, we have met the test set down by our courts for dealing with multiplicity of counts in an indictment.

There is a well-accepted maxim of statutory construction that a specific statute controls over a general one without regard to priority of enactment. Morton v. Mancari, 94 S.Ct. 2474 (1974); Bulova v. United States, 365 U.S. 753 (1961); Thielebeule v. M/S Nordee Pilot, 452 F.2d 1230 (2d Cir. 1971); Essenfeld v. Commissioner, 311 F.2d 208 (2d Cir. 1962); General Electric

Credit Corp. v. James Talcott, Inc. 271 F.Supp. 699 (S.D.N.Y. 1966); United States v. Shackelford, 180 F.Supp. 857 (S.D.N.Y. 1957). In this instance, the specific SEC regulation that deals particularly with the mailing of proxy statements which are misleading for the purpose of soliciting proxies, should supersede the mail fraud statute. It was Congress' intention to deal specifically with this problem by enacting the SEC regulations, rather than the mail fraud statute.

Another serious defect in this indictment involves the charge in count two that certain of the SEC rules were violated by the mailing of misleading proxy statements to solicit proxies. Whereas counts three, four, and five charge violations of the mail fraud statute by claiming within those very counts violations of the very same SEC rules. In other words, in count two, the defendant was charged with the actual violations of the SEC sections themselves, whereas in counts three, four, and five, the defendant was charged with committing mail fraud because he violated the very same SEC rules that are encompassed in count two.

It is evident that Congress intended to create one offense—the soliciting of a proxy statement in a misleading fashion by use of the mail—which was to receive one punishment. In dealing with that specific offense, Congress enacted a particular provision which provided for leniency where there was no knowledge of the rule. It would seem apparent that if the state cannot constitutionally obtain two convictions for the same act on two separate grounds, it cannot do so on the same grounds. Although admittedly there is less expense, anxiety and ordeal when the blows are delivered at once, one can hardly say that one is not punished, hurt, or embarrassed, if one receives several convictions. The collateral effects of a conviction, independent of the sentence, are many and varied. See Note, Collateral consequences of a Criminal Conviction, 23 Vand.L.Rev. 929 (1970); note, Civil Disabilities of Felons, 53 Va.L.Rev. 403 (1967); and Sibron v. New York, 392 U.S. 40, 53-58 (1968).

Nor are all the harmful consequences eradicated by the vacation of the other sentences. For several states permit the use, for purpose of credibility of a

witness, of a verdict of guilty upon which no judgment has been entered or sentence passed. Annot. 14 A.L.R.3d 1272 (1967). Moreover, even if no other disability were incurred, there is always an extra stigma imposed upon one's reputation.*

Certainly this is constitutionally impermissible and flies directly in the face of rule 14 of the Federal Rules of Criminal Procedure. This inexcusable error in pleading disabled the indictment and should have required either a dismissal of the superfluous counts or an election on the part of the prosecution. The court's failure to take this remedial action gravely prejudiced the appellant for the reasons previously urged and must have influenced the court in its sentencing of Dixon.

For all these reasons, the appellant's judgment of conviction should be reversed and a new trial granted.

* The language cited and the authorities listed are taken from O'Clair v. United States, 470 F.2d 1199 (1st Cir. 1972) dealing with multiple convictions of bank robbery under §2113 of Title 18.

POINT IV

THE COURT MISADVISED THE JURY ON THE APPELLANT'S RESPONSIBILITY AS PRESIDENT OF AVM.

Another question presented by this appeal which reaches due process proportions involves the court's unfortunate instruction to the jury that a higher duty of conduct was imposed upon Lloyd Dixon merely because he was the president of AVM. At several key points during its charge, the court referred to the special duties of a corporate president (222, 223, 230) and went so far as to state:

"As I have already charged you, that more is expected and required of a president of a corporation in the way of reasonable investigation than can reasonably be expected of a lesser official" (233, 234).

The court embraced the argument made at the end of the prosecution's case by the government that Dixon was charged merely because he was the chief executive of AVM.*

* Mr. Stewart: "That is why Mr. Dixon is here and not maybe Lewis or Hammond or somebody else. I mean he is the man at the helm and I think under the cases a corporate president is held to a higher standard of inquiring and governing his conduct accordingly than the lesser employees and officers of the corporation and I have cited several cases in here which I think support that position" (p. 110, 111 of summation).

This ill-conceived approach, supported by both the government and the court, contributed greatly to the appellant's conviction. This grievous error in the court's charge was duly excepted to by counsel (342, 343).

The fiduciary duties imposed upon a corporate officer are appropriate in a civil proceeding, but have no place in a criminal trial.* The government's burden of proving a case beyond a reasonable doubt is unaltered by the defendant's office in a business or station in life. In re Winship, 397 U.S. 358 (1970). This regrettable misinstruction detracted from the normal criminal disciplines which apply in every prosecution, such as presumption of innocence, proof beyond a reasonable doubt, criminal intent and knowledge. As we pointed out earlier in this brief, even it was shown that Dixon breached some fiduciary duty as president of AVM, the cases cited under

* We recognize that in civil proceedings and civil SEC litigation fiduciary responsibilities play a prominent role. Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir.), cert denied, Bangor Punta Corp. v. Chris-Craft Industries, Inc., 414 U.S. 910 (1973), First Boston Corp. v. Chris-Craft Industries, Inc., 414 U.S. 910 (1973), Piper v. Chris-Craft Industries, Inc., 414 U.S. 910 (1973) and SEC v. Bangor Punta Corp., 414 U.S. 924 (1973); Nichols-Morris Corp. v. Morris, 174 F.Supp. 691 (S.D.N.Y.), appeal dismissed, 272 F.2d 586 (2d Cir. 1959). However, these authorities have no application to a criminal case.

Point I of this brief uniformly hold that such neglect cannot constitute a fraud, which is a prerequisite to a conviction under the conspiracy or mail fraud laws.

The prosecution exploited this unfair advantage by lashing out at the jury time and time again declaring that as president or chief executive of AVM, Lloyd Dixon should be held to a higher standard of conduct than anyone else (T 252, 253, 268, 270).*

To condone this distortion of the law is bound to carry implications and give directions far beyond the facts of this case. No corporate officer or director will ever be safe if he will have imposed upon him additional criminal liability, unprovided for in any section of the federal criminal law. This misconstruction cannot be tolerated for if ignored, it will spread like a brushfire into other white collar prosecutions. If the Court gives in to the government here, there will be no end to this misapplication of the law, and basic procedural safeguards, so essential to a free society, will be imperiled.

* Refers to trial transcript of summation.

In closing, we remind this Court that although the trial only lasted three days, the jury deliberated for the better part of two days! This Court properly acknowledged in United States v. Persico, 305 F.2d 534, 536 (2d Cir. 1962) that in close cases, errors must be scrutinized ". . . with extreme care since there is grave possibility of prejudice to the defendants in a case such as this by error which might in other circumstances be deemed relatively minor." (Citing Glasser v. United States, 315 U.S.60, 67 (1942)).

In keeping with this Court's admonitions in Persico, we urge that each of these errors must be examined most carefully.

For all these reasons, the judgment of conviction should be reversed and a new trial granted.

CONCLUSION

Lloyd Dixon has lost everything—his office, his position, and his main source of income. His life lays about him in ruins. A year's jail term comes as a bitter apostrophe after the calamity of this conviction. The acknowledgement that the appellant has been condemned to a felony conviction merely because he followed the advice of his accountants and lawyer and knew nothing of this reporting rule is reason enough to reverse the conviction. However, of much greater importance is the awesome realization that such an unwarranted conviction inevitably affects the integrity of our whole judicial system. For if any man can be convicted on this impoverished evidence and suffer a year's imprisonment, then no man is safe.

The appellant seeks refuge in this Court, confident that justice will ultimately be done. Lloyd Dixon follows in the footsteps of a host of other men who were also wrongly convicted by misguided juries and who walked a well worn path to this Court and were justly spared. We

are confident this Court will give his case the same careful consideration as it has accorded others. No higher duty, no more solemn responsibility, rests upon every member of this Court than to see that no man is convicted unlawfully.

For all of these reasons, the appellant's judgment of conviction should be reversed and the indictment must be dismissed.

Respectfully submitted,

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APPENDIX
SEC Regulations

SEC Regulations

Section 78n of Title 15 (Sec. 14 of 1934 Act) - Proxies

(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security

* * *

Section 78ff of Title 15 (Sec. 32 of 1934 Act) - Penalties

(a) Any person who wilfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter

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or any rule or regulation thereunder of any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding \$500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

* * *

(c) The provisions of this section shall not apply in the case of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78o of this title, except a violation which consists of making, or causing to be made, any statement in any report or document required to be filed under any such rule or regulation, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact.

SEC Regulations

§ 210.5-04 What schedules are to be filed.

(a) Except as expressly provided otherwise in the applicable form:

(1) The schedules specified below in this section as Schedules I, IX, XI, XIII, XIV and XV shall be filed as of the date of the most recent balance sheet filed for each person or group: *Provided*, That any such schedule (other than Schedule I) may be omitted if all the following conditions exist:

(i) The financial statements are being filed as part of an annual or other periodic report;

(ii) The information that would be shown in the respective columns of such schedule would reflect no changes as to any issue of securities of the registrant or any significant subsidiary in excess of 5 percent of the outstanding securities of such issue as shown in the most recently filed annual report containing such schedule; and

(iii) Any information required by columns G and H of Schedule XIII—Capital shares, is shown in the related balance sheet or in a footnote thereto.

Such schedules shall be certified if the related balance sheet is certified.

(2) All other schedules specified below in this section shall be filed for each period for which a profit and loss statement is filed. Such schedules shall be certified if the related profit and loss statement is certified.

(b) The information required in schedules for the registrant and for the registrant and its subsidiaries consolidated may be presented in the form of a single schedule, provided that items pertaining to the registrant are separately shown and that such single schedule affords a properly summarized presentation of the facts.

(c) Reference to the schedules shall be made against the appropriate captions of the balance sheet and the profit and loss statement.

(d) If the information required by any schedule (including the footnotes thereto) may be shown in the related balance sheet without making such statement unclear or confusing, that procedure may be followed and the schedule omitted.

Schedule I—Marketable securities; other security investments. The schedule presented by § 210.12-02 shall be filed:

(1) In support of caption 2 of a balance sheet, if the greater of the aggregate amount of marketable securities on the basis of current market quotations or the amount at which carried in such balance sheet constitutes 15 percent or more of total assets.

(2) In support of caption 11 of a balance sheet if the amount at which other security investments is carried in such balance sheet constitutes 15 percent or more of total assets.

(3) In support of captions 2 and 11 of a balance sheet if the amount at which other security investments is carried in such balance sheet plus the greater of the aggregate amount of marketable securities on the basis of current market quotations or the amount at which carried on such balance sheet constitutes 20 percent or more of total assets.

Schedule II—Amounts due from directors, officers, and principal holders of equity securities other than affiliates. The schedule prescribed by § 210.12-03 shall be filed with respect to each person among the directors, officers and principal holders of equity securities other than affiliates, from whom an aggregate indebtedness of more than \$20,000 or 1 percent of total assets, whichever is less, is owed, or at any time during the period for which related profit and loss statements are filed, was owed. For the purposes of this schedule, exclude in the determination of the amount of indebtedness all amounts due from such persons for purchases subject to usual trade terms, for ordinary travel and expense advances and for other such items arising in the ordinary course of business.

Schedule III—Investments in securities of affiliates. The schedule prescribed by § 210.12-04 shall be filed in support of caption 9 of each balance sheet: *Provided*, That this schedule may be omitted if (1) neither the sum of captions 9 and 10 in the related balance sheet nor the amount of caption 29 in such balance sheet exceeds 5 percent of total assets (exclusive of intangible assets) as shown by the related balance sheet at either the beginning or end of the period or (2) there have been no changes in the information required to be filed from that last previously reported.

Schedule IV—Indebtedness of affiliates; not current. The schedule prescribed by § 210.12-05 shall be filed in support of caption 10 of each balance sheet. This schedule and Schedule X may be combined if desired. This schedule may be omitted if (1) neither the sum of captions 9 and 10 in the related balance sheet nor the amount of caption 29 in such balance sheet exceeds 5 percent of total assets (exclusive of intangible assets) as shown by the related balance sheet at either the beginning or end of the period, or (2) there have been no changes in the information required to be filed from that last previously reported.

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Schedule V—Property, plant, and equipment. The schedule prescribed by § 210.12-06 shall be filed in support of caption 13 of each balance sheet, provided that this schedule may be omitted if the total shown by caption 13 does not exceed 5 percent of total assets (exclusive of intangible assets) as shown by the related balance sheet at both the beginning and end of the period and if neither the additions nor deductions during the period exceeded 5 percent of total assets (exclusive of intangible assets) as shown by the related balance sheet.

Schedule VI—Reserves for depreciation, depletion, and amortization of property, plant, and equipment. The schedule prescribed by § 210.12-07 shall be filed in support of caption 14 of each balance sheet. This schedule may be omitted if Schedule V is omitted.

Schedule VII—Intangible assets. The schedule prescribed by § 210.12-08 shall be filed in support of caption 15 of each balance sheet.

Schedule VIII—Reserves for depreciation and amortization of intangible assets. The schedule prescribed by § 210.12-09 shall be filed in support of caption 16 of each balance sheet.

Schedule IX—Bonds, mortgages and similar debt. The schedule prescribed by § 210.12-10 shall be filed in support of caption 23 of each balance sheet.

Schedule X—Indebtedness to affiliates; not current. The schedule prescribed by § 210.12-11 shall be filed in support of caption 29 of each balance sheet. This schedule and Schedule IV may be combined if desired. This schedule may be omitted if (1) neither the sum of captions 9 and 10 in the related balance sheet nor the amount of caption 29 in such balance sheet exceeds 5 percent of total assets (exclusive of intangible assets) as shown by the related balance sheet at either the beginning or end of the period, or (2) there have been no changes in the information required to be filed from that last previously reported.

Schedule XI—Guarantees of securities of other issuers. The schedule prescribed by § 210.12-12 shall be filed with respect to any guarantees of securities of other issuers by the person for which the statement is filed.

Schedule XII—Reserves. The schedule prescribed by § 210.12-13 shall be filed in support of reserves included in the balance sheet but not included in Schedules VI and VIII.

Schedule XIII—Capital shares. The schedule prescribed by § 210.12-14 shall be filed in support of caption 34 of each balance sheet.

Schedule XIV—Warrants or rights. The schedule prescribed by § 210.12-15 shall be filed with respect to warrants or rights granted by the person for which the statement is filed to subscribe for or purchase securities to be issued by such person.

Schedule XV—Other securities. If there are any classes of securities not included in Schedules IX, XI, XIII, or XIV, set forth in this schedule information concerning such securities corresponding to that required for the securities included in such schedules. Information need not be set forth, however, as to notes, drafts, bills of exchange, or bankers' acceptances, having a maturity at the time of issuance of not exceeding 1 year.

Schedule XVI—Supplementary profit and loss information. The schedule prescribed by § 210.12-16 shall be filed in support of each profit and loss statement in which sales or operating revenues were of significant amount. This schedule may also be omitted if the information required by columns B and C and footnotes 4 and 5 thereof is furnished in the profit and loss or income statement or in a footnote thereto.

Schedule XVII—Income from dividends; equity in net profit and loss of affiliates. The schedule prescribed by § 210.12-17 [Rule 12-17] shall be filed for each period for which a profit and loss statement is filed. This schedule may be omitted if neither the sum of captions 9 and 10 in the related balance sheet nor the amount of caption 29 in such balance sheet exceeds 5 percent of total assets (exclusive of intangible assets) as shown by the related balance sheet at either the beginning or end of the period.

[Reg. S-X, 5 F.R. 954, as amended at 7 F.R. 778, 10631, 3 F.R. 16675; 15 F.R. 9323, Dec. 23, 1950]

COMMERCIAL, INDUSTRIAL AND MINING COMPANIES IN THE PROMOTIONAL, EXPLORATORY OR DEVELOPMENT STAGE

SOURCE: §§ 210.5a-01 to 210.5a-07 appear at 13 F.R. 6440, Nov. 2, 1948 unless otherwise noted.

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§ 240.14a-101 Schedule 14A. Information required in proxy statement.¹

NOTES: A. Where any item calls for information with respect to any matter to be acted upon and such matter involves other matters with respect to which information is called for by other items of this schedule, the information called for by such other items shall also be given. For example, a merger, consolidation, or acquisition or disposition of assets specified in Item 14, in which the security holders to be solicited will become or continue to be security holders of the surviving or acquiring company, shall be deemed to involve the election of directors if any person who will serve as a director of such company was not elected to such office by security holders of the issuer of the securities in respect of which proxies are to be solicited. In such case, Items 6 and 7 shall be answered with respect to each such person who will serve as a director of the surviving or acquiring company.

B. Where any item calls for information with respect to any matter to be acted upon at the meeting, such item need be answered in the management's soliciting material only with respect to proposals to be made by or on behalf of the management of the issuer.

C. Except as otherwise specifically provided, where any item calls for information for a specified period in regard to directors, officers or other persons holding specified positions or relationships, the information shall be given in regard to any person who held any of the specified positions or relationships at any time during the period. However, information need not be included for any portion of the period during which such person did not hold any such position or relationship provided a statement to that effect is made.

Item 1. Revocability of proxy. State whether or not the person giving the proxy has the power to revoke it. If the right of revocation before the proxy is exercised is limited or is subject to compliance with any formal procedure, briefly describe such limitation or procedure.

Item 2. Dissenters' rights of appraisal. Outline briefly the rights of appraisal or similar rights of dissenters with respect to any matter to be acted upon and indicate any statutory procedure required to be followed by dissenting security holders in order to perfect such rights. Where such rights may be exercised only within a limited time after the date of adoption of a proposal, the filing of a charter amendment or other simi-

¹ 30 F.R. 14016, Nov. 6, 1965.

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lar act, state whether the persons solicited will be notified of such date.

Instruction. Indicate whether a security holder's failure to vote against a proposal will constitute a waiver of his appraisal or similar rights and whether a vote against a proposal will be deemed to satisfy any notice requirements under State law with respect to appraisal rights. If the State law is unclear, state what position will be taken in regard to these matters.

Item 3. Persons Making the Solicitation—

(a) **Solicitations not subject to § 240.14a-11 (Rule X-14A-11).** (1) If the solicitation is made by the management of the issuer, so state. Give the name of any director of the issuer who has informed the management in writing that he intends to oppose any action intended to be taken by the management and indicate the action which he intends to oppose.

(2) If the solicitation is made otherwise than by the management of the issuer, so state and give the names of the persons by whom and on whose behalf it is made.

(3) If the solicitation is to be made otherwise than by the use of the mails, describe the methods to be employed. If the solicitation is to be made by specially engaged employees or paid solicitors, state (i) the material features of any contract or arrangement for such solicitation and identify the parties, and (ii) the cost or anticipated cost thereof.

(4) State the names of the persons by whom the cost of solicitation has been or will be borne, directly or indirectly.

(b) **Solicitations subject to § 240.14a-11 (Rule X-14A-11).** (1) State by whom the solicitation is made and describe the methods employed and to be employed to solicit security holders.

(2) If regular employees of the issuer or any other participant in a solicitation have been or are to be employed to solicit security holders, describe the class or classes of employees to be so employed, and the manner and nature of their employment for such purpose.

(3) If specially engaged employees, representatives or other persons have been or are to be employed to solicit security holders, state (i) the material features of any contract or arrangement for such solicitation and identify the parties, (ii) the cost or anticipated cost thereof, and (iii) the approximate number of such employees or employees of any other person (naming such other person) who will solicit security holders.

(4) State the total amount estimated to be spent and the total expenditures to date for, in furtherance of, or in connection with the solicitation of security holders.

(5) State by whom the cost of the solicitation will be borne. If such cost to be borne initially by any person other than the issuer, state whether reimbursement will be sought from the issuer, and, if so, whether

the question of such reimbursement will be submitted to a vote of security holders.

Instruction. With respect to solicitations subject to § 240.14a-11 (Rule X-14A-11), costs and expenditures within the meaning of this Item 3 shall include fees for attorneys, accountants, public relations or financial advisers, solicitors, advertising, printing, transportation, litigation and other costs incidental to the solicitation, except that the issuer may exclude the amount of such costs represented by the amount normally expended for a solicitation for an election of directors in the absence of a contest, and costs represented by salaries and wages of regular employees and officers, provided a statement to that effect is included in the proxy statement.

Item 4. Interest of Certain Persons in Matters To Be Acted Upon—(a) Solicitations not subject to § 240.14a-11 (Rule X-14A-11). Describe briefly any substantial interest, direct or indirect, by security holders or others of each of the following persons in any matter to be acted upon, other than elections to office:

(1) If the solicitation is made on behalf of management, each person who has been a director or officer of the issuer at any time since the beginning of the last fiscal year.

(2) If the solicitation is made otherwise than on behalf of management, each person on whose behalf the solicitation is made. Any person who would be a participant in a solicitation for purposes of § 240.14a-11 (Rule X-14A-11) as defined in paragraph (b) (2), (3), (4), (5) and (6) thereof shall be deemed a person on whose behalf the solicitation is made for purposes of this paragraph (a).

(3) Each nominee for election as a director of the issuer.

(4) Each associate of the foregoing persons.

Instruction. Except in the case of a solicitation subject to this regulation made in opposition to another solicitation subject to this regulation, this sub-item (a) shall not apply to any interest arising from the ownership of securities of the issuer where the security holder receives no extra or special benefit not shared on a pro rata basis by all other holders of the same class.

(b) **Solicitations subject to § 240.14a-11 (Rule X-14A-11).** (1) Describe briefly any substantial interest, direct or indirect, by security holders or otherwise, of each participant as defined in § 240.14a-11 (b) (2), (3), (4), (5) and (6) (Rule X-14A-11), in any matter to be acted upon at the meeting, and include with respect to each participant the information, or a fair and adequate summary thereof, required by Items 2(a), 2(a), 3, 4 (b) and 4 (c) of Schedule 14D.

(2) With respect to any person named in answer to Item 4 (b), describe any substantial interest, direct or indirect, by security holders or otherwise, that he has in any matter to be acted upon at the meeting, and furnish the information called for by Item 4 (b) and (c) of Schedule 14D.

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Item 5. Voting securities and principal holders thereof. (a) State as to each class of voting securities of the issuer entitled to be voted at the meeting, the number of shares outstanding and the number of votes to which each class is entitled.

(b) Give the date as of which the record of security holders entitled to vote at the meeting will be determined. If the right to vote is not limited to security holders of record on that date, indicate the conditions under which other security holders may be entitled to vote.

(c) If action is to be taken with respect to the election of directors and if the persons solicited have cumulative voting rights, make a statement that they have such rights and state briefly the conditions precedent to the exercise thereof.

(d) If to the knowledge of the persons on whose behalf the solicitation is made, any person owns of record or beneficially more than 10 percent of the outstanding voting securities of the issuer, name such person, state the approximate amount of such securities owned of record but not owned beneficially and the approximate amount owned beneficially by such person and the percentage of outstanding voting securities represented by the amount of securities so owned in each such manner.

(e) If to the knowledge of the persons on whose behalf the solicitation is made, a change in control of the issuer has occurred since the beginning of its last fiscal year, state the name of the person or persons who acquired such control, the basis of such control, the date and a description of the transaction or transactions in which control was acquired and the percentage of voting securities of the issuer now owned by such person or persons.

(f) Describe any contractual arrangements, including any pledge of securities of the issuer or any of its parents, known to the persons on whose behalf the solicitation is made, the operation of the terms of which may at a subsequent date result in a change in control of the issuer.

Instruction. Paragraph (f) does not require a description of ordinary default provisions contained in the charter, trust indentures or other governing instruments relating to securities of the issuer.

Item 6. Nominees and directors. (a) If action is to be taken with respect to the election of directors, furnish the following information, in tabular form to the extent practicable, with respect to each person nominated for election as a director and each other person whose term of office as a director will continue after the meeting:

(1) Name each such person, state when his term of office or the term of office for which he is a nominee will expire, and all other positions and offices with the issuer presently held by him, and indicate which persons are nominees for election as directors at that meeting.

(2) State his present principal occupation or employment and give the name and principal business of any corporation or other organization in which such employment is carried on. Furnish similar information as to all of his principal occupations or employments during the last five years, unless he is now a director and was elected to his present term of office by a vote of security holders at a meeting for which proxies were solicited under this regulation.

(3) If he is or has previously been a director of the issuer state the period or periods during which he has served as such.

(4) State, as of the most recent practicable date, the approximate amount of each class of equity securities of the issuer or any of its parents or subsidiaries, other than directors' qualifying shares, beneficially owned directly or indirectly by him. If he is not the beneficial owner of any such securities, make a statement to that effect.

(5) If more than 10 percent of any class of securities of the issuer or any of its parents or subsidiaries are beneficially owned by him and his associates, state the approximate amount of each class of such securities beneficially owned by such associates, naming each associate whose holdings are substantial.

(b) If any nominee for election as a director is proposed to be elected pursuant to any arrangement or understanding between the nominee and any other person or persons, except the directors and officers of the issuer acting solely in that capacity, name such other person or persons and describe briefly such arrangement or understanding.

(c) If fewer nominees are named than the number fixed by or pursuant to the governing instruments, state the reasons for this procedure and that the proxies cannot be voted for a greater number of persons than the number of nominees named.

Item 7. Remuneration and other transactions with management and others. (See Note C at the beginning of this section) Furnish the information called for by this item if action is to be taken with respect to (i) the election of directors, (ii) any bonus, profit sharing or other remuneration plan, contract or arrangement in which any director, nominee for election as a director, or officer of the issuer will participate, (iii) any pension or retirement plan in which any such person will participate or (iv) the granting or extension to any such person of any options, warrants or rights to purchase any securities, other than warrants or rights issued to security holders, as such, on a pro-rata basis. However, if the solicitation is made on behalf of persons other than the management, the information required need be furnished only as to nominees for election as directors and as to their associates.

(a) Furnish the following information in substantially the tabular form indicated below as to all direct remuneration paid by the issuer and its subsidiaries during the issuer's

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last fiscal year to the following persons for services in all capacities:

(1) Each director of the issuer whose aggregate direct remuneration exceeded \$40,000, and each of the three highest paid officers of the issuer whose aggregate direct remuneration exceeded that amount, naming each such director and officer.

(2) All directors and officers of the issuer as a group, stating the number of persons in the group without naming them.

Name of individual or number of persons in group	Capacities in which remuneration was received	Aggregate direct remuneration
(A)	(B)	(C)

Instructions. 1. Paragraph (a)(1) of this item does not apply to any person who was not named as a director or officer of the issuer in answer to Item 7 of Form 10 in the first registration statement filed on that form for the registration of a class of securities pursuant to section 12 of the Act, provided (i) such person has not been a director or officer of the issuer since the filing of such statement and (ii) the same information is not otherwise required to be disclosed in material filed with the Commission.

2. The information is to be given on an accrual basis if practicable. The tables required by this paragraph (a) and paragraph (b) below may be combined if the issuer so desires.

3. Do not include remuneration paid to a partnership to which any director or officer was a partner, but see paragraph (f) below.

(b) Furnish the following information in substantially the tabular form indicated as to all annuity, pension, or retirement benefits proposed to be paid to the following persons in the event of retirement at normal retirement date pursuant to any existing plan provided or contributed to by the issuer or any of its subsidiaries:

(1) Each director or officer named in answer to paragraph (a)(1), naming each such person.

(2) All directors and officers of the issuer who are eligible for such benefits, as a group, stating the number of persons in the group without naming them.

Col. (A)	Col. (B)	Col. (C)
Name of individual or number of persons in group	Amount set aside or accrued during issuer's last fiscal year	Estimated annual benefits upon retirement

Instructions. 1. The term "plan" in this paragraph and in paragraph (c) includes all

plans, contracts, authorizations or arrangements, whether or not set forth in any formal document.

2. Column (B) need not be answered with respect to payments computed on an actuarial basis under any plan which provides for fixed benefits in the event of retirement at a specified age or after a specified number of years of service. In such case, Columns (A) and (C) need not be answered with respect to directors and officers as a group.

3. The information called for by Column (C) may be given in the form of a table showing the annual benefits payable upon retirement to persons in specified salary classifications.

4. In the case of any plan (other than those specified in Instruction 2) where the amount set aside each year depends upon the amount of earnings of the issuer or its subsidiaries for such year or a prior year, or where it is otherwise impracticable to state the estimated benefits upon retirement, there shall be set forth, in lieu of the information called for by Column (C), the aggregate amount set aside or accrued to date, unless it is impracticable to do so, in which case there shall be stated the method of computing such benefits.

(c) Describe briefly all remuneration payments (other than payments reported under paragraph (a) or (b) of this item) proposed to be made in the future, directly or indirectly, by the issuer or any of its subsidiaries pursuant to any existing plan or arrangement to (i) each director or officer named in answer to paragraph (a)(1), naming each such person, and (ii) all directors and officers of the issuer as a group, without naming them.

Instruction. Information need not be included as to payments to be made for, or benefits to be received from, group life or accident insurance, group hospitalization or similar group payments or benefits. If it is impracticable to state the amount of remuneration payments proposed to be made, the aggregate amount set aside or accrued to date in respect of such payments shall be stated, together with an explanation of the basis for future payments.

(d) Furnish the following information as to all options to purchase any securities from the issuer or any of its subsidiaries which were granted to or exercised by the following persons since the beginning of the issuer's last fiscal year, and as to all options held by such persons as of the latest practicable date: (1) Each director or officer named in answer to paragraph (a)(1), naming each such person, and (ii) all directors and officers of the issuer as a group, without naming them.

(1) As to options granted during the period specified (i) state the title and aggregate amount of securities called for; (ii) state the average option price per share and (iii) if the option price was less than 100 percent of the market value of the security on the date of grant, such fact and

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the market price on such date shall be disclosed.

(2) As to options exercised during the period specified, state (i) the title and aggregate amount of securities purchased; (ii) the aggregate purchase price and (iii) the aggregate market value of the securities purchased on the date of purchase.

(3) As to all unexercised options held as of the latest practicable date, regardless of when such options were granted, state (i) the title and aggregate amount of securities called for, and (ii) the average option price per share.

Instructions. 1. The term "options" as used in this paragraph (d) includes all options, warrants or rights, other than those issued to security holders as such on a pro rata basis. Where the average option price per share is called for, the weighted average price per share shall be given.

2. The extension, regranting or material amendment of options shall be deemed the granting of options within the meaning of this paragraph.

3. (i) Where the total market value on the granting dates of the securities called for by all options granted during the period specified does not exceed \$10,000 for any officer or director named in answer to paragraph (a)(1), or \$30,000 for all officers and directors as a group, this item need not be answered with respect to options granted to such person or group. (ii) Where the total market value on the dates of purchase of all securities purchased through the exercise of options during the period specified does not exceed \$10,000 for any such person or \$30,000 for such group, this item need not be answered with respect to options exercised by such person or group. (iii) Where the total market value as of the latest practicable date of the securities called for by all options held at such time does not exceed \$10,000 for any such person or \$30,000 for such group, this item need not be answered with respect to options held as of the specified date by such person or group.

4. The information called for by this paragraph may be furnished in the form of the table set forth in Appendix A (§240.14a-103). In such case, the information need be furnished only for the period specified in this paragraph and information need not be included as to shares sold during the period. However, if Item 9, 10, or 11 is required to be answered, all of the information specified in Appendix A must be furnished for the 6-year period referred to therein and need not be separately furnished for the period specified in this paragraph.

(e) State as to each of the following persons who was indebted to the issuer or its subsidiaries at any time since the beginning of the last fiscal year of the issuer, (i) the largest aggregate amount of indebtedness outstanding at any time during such period, (ii) the nature of the indebtedness and of the transaction in which it was incurred,

(iii) the amount thereof outstanding as of the latest practicable date, and (iv) the rate of interest paid or charged thereon:

(1) Each director or officer of the issuer;

(2) Each nominee for election as a director; and,

(3) Each associate of any such director, officer or nominee.

Instructions. 1. Include the name of each person whose indebtedness is described and the nature of the relationship by reason of which the information is required to be given.

2. This paragraph does not apply to any person whose aggregate indebtedness did not exceed \$10,000 or 1 percent of the issuer's total assets, whichever is less, at any time during the period specified. Exclude in the determination of the amount of indebtedness all amounts due from the particular person for purchases subject to usual trade terms, for ordinary travel and expense advances and for other transactions in the ordinary course of business.

3. Notwithstanding Instruction 2, if the issuer or any of its subsidiaries is engaged primarily in the business of making loans and loans to any of the specified persons in excess of \$10,000 or 1 percent of its total assets, whichever is less, were outstanding at any time during the period specified, such loans shall be disclosed. However, if the lender is a bank, such disclosure may consist of a statement, if such is the case, that the loans to such persons (i) were made in the ordinary course of business, (ii) were made on substantially the same terms, including interest rates and collateral, as those prevailing at the time for comparable transactions with other persons, and (iii) did not involve more than normal risk of collectibility or present other unfavorable features.

4. If to the knowledge of the persons on whose behalf the solicitation is made, any indebtedness required to be described arose under Section 16(b) of the Act and has not been discharged by payment, state the amount of any profit realized, that such profit will inure to the benefit of the issuer or its subsidiaries and whether suit will be brought or other steps taken to recover such profit. If in the opinion of counsel a question reasonably exists as to the recoverability of such profit, it will suffice to state all facts necessary to describe the transaction, including the prices and number of shares involved.

(f) Describe briefly any transactions since the beginning of the issuer's last fiscal year or any presently proposed transactions, to which the issuer or any of its subsidiaries was or is to be a party, in which any of the following persons had or is to have a direct or indirect material interest, naming such person and stating his relationship to the issuer, the nature of his interest in the transaction and, where practicable, the amount of such interest:

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- (1) Any director or officer of the issuer;
- (2) Any nominee for election as a director;
- (3) Any security holder named in answer to Item 5(d); or
- (4) Any relative or spouse of any of the foregoing persons, or any relative of such spouse, who has the same home as such person or who is a director or officer of any parent or subsidiary of the issuer.

Instructions. 1. No information need be given in response to this Item 7(f) as to any remuneration or other transaction reported in response to Item 7 (a), (b), (c), (d), or (e), or as to any transaction with respect to which information may be omitted pursuant to Instruction 2 to Item 7(b), the instruction to Item 7(c), Instruction 3 to Item 7(d) or Instruction 2 or 3 to Item 7(e).

2. No information need be given in answer to this Item 7(f) as to any transaction where—

(a) The rates or charges involved in the transaction are determined by competitive bids, or the transaction involves the rendering of services as a common or contract carrier, or public utility, at rates or charges fixed in conformity with law or governmental authority;

(b) The transaction involves services as a bank depository of funds, transfer agent, registrar, trustee under a trust indenture, or similar services;

(c) The amount involved in the transaction or a series of similar transactions, including all periodic installments in the case of any lease or other agreement providing for periodic payments or installments, does not exceed \$20,000; or

(d) The interest of the specified person arises solely from the ownership of securities of the issuer and the specified person receives no extra or special benefit not shared on a pro rata basis by all holders of securities of the class.

3. It should be noted that this item calls for disclosure of indirect, as well as direct, material interests in transactions. A person who has a position or relationship with a firm, corporation, or other entity, which engages in a transaction with the issuer or its subsidiaries may have an indirect interest in such transaction by reason of such position or relationship. However, a person shall be deemed not to have a material indirect interest in a transaction within the meaning of this Item 7(f) where—

(a) The interest arises only (i) from such person's position as a director of another corporation or organization (other than a partnership) which is a party to the transaction, or (ii) from the direct or indirect ownership by such person and all other persons specified in subparagraphs (1) through (4) above, in the aggregate, of less than a 10 percent equity interest in another person (other than a partnership) which is a party to the transaction, or (iii) from both such position and ownership.

(b) The interest arises only from such person's position as a limited partner in a

partnership in which he and all other persons specified in (1) through (4) above have an interest of less than 10 percent; or

(c) The interest of such person arises solely from the holding of an equity interest (including a limited partnership interest) but excluding a general partnership interest, or a creditor interest in another person which is a party to the transaction with the issuer or any of its subsidiaries and the transaction is not material to such other person.

4. The amount of the interest of any specified person shall be computed without regard to the amount of the profit or loss involved in the transaction. Where it is not practicable to state the approximate amount of the interest, the approximate amount involved in the transaction shall be indicated.

5. In describing any transaction involving the purchase or sale of assets by or to the issuer or any of its subsidiaries, otherwise than in the ordinary course of business, state the cost of the assets to the purchaser and, if acquired by the seller within 2 years prior to the transaction, the cost thereof to the seller.

6. The foregoing instructions specify certain transactions and interests as to which information may be omitted in answering this item. There may be situations where, although the foregoing instructions do not expressly authorize nondisclosure, the interest of a specified person in the particular transaction or series of transactions is not a material interest. In that case, information regarding such interest and transaction is not required to be disclosed in response to this item.

(g) Describe briefly any transactions since the beginning of the issuer's last fiscal year or any presently proposed transactions, to which any pension, retirement, savings or similar plan provided by the issuer, or any of its parents or subsidiaries, was or is to be a party, in which any of the following persons had or is to have a direct or indirect material interest, naming such person and stating his relationship to the issuer, the nature of his interest in the transaction and, where practicable, the amount of such interest:

- (1) Any director or officer of the issuer;
- (2) Any nominee for election as a director;
- (3) Any security holder named in answer to Item 5(d);

(4) Any relative or spouse of any of the foregoing persons, or any relative of such spouse, who has the same home as such person or who is a director or officer of any parent or subsidiary of the issuer; or

(5) The issuer or any of its subsidiaries.

Instructions. 1. Instructions 2, 3, 4, and 5 to Item 7(f) shall apply to this Item 7(g).

2. Without limiting the general meaning of the term "transaction" there shall be included in answer to this item any remuneration received or any loans received or outstanding during the period, or proposed to be received.

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3. No information need be given in answer to paragraph (g) with respect to—

(a) payments to the plan, or payments to beneficiaries, pursuant to the terms of the plan;

(b) payment of remuneration for services not in excess of 5 percent of the aggregate remuneration received by the specified person during the issuer's last fiscal year from the issuer and its subsidiaries; or

(c) any interest of the issuer or any of its subsidiaries which arises solely from its general interest in the success of the plan.

Item 8. Selection of auditors. If action is to be taken with respect to the selection or approval of auditors, or if it is proposed that particular auditors shall be recommended by any committee to select auditors for whom votes are to be cast, name the auditors and describe briefly any direct financial interest or any material indirect financial interest in the issuer or any of its parents or subsidiaries or any connection during the past three years with the issuer or any of its parents or subsidiaries in the capacity of promoter, underwriter, voting trustee, director, officer or employee.

Item 9. Bonus, profit sharing and other remuneration plans. If action is to be taken with respect to any bonus, profit sharing or other remuneration plan, furnish the following information:

(a) Describe briefly the material features of the plan, identify each class of persons who will participate therein, indicate the approximate number of persons in each such class and state the basis of such participation.

(b) State separately the amounts which would have been distributable under the plan during the last fiscal year of the issuer (1) to directors and officers and (2) to employees if the plan had been in effect.

(c) State the name and position with the issuer of each person specified in Item 7(a), who will participate in the plan and the amount which each such person would have received under the plan for the last fiscal year of the issuer if the plan had been in effect.

(d) Furnish such information, in addition to that required by this item and Item 7, as may be necessary to describe adequately the provisions already made pursuant to all bonus, profit sharing, pension, retirement, stock option, stock purchase, deferred compensation, or other remuneration or incentive plans, now in effect or in effect within the past 5 years, for (i) each director or officer named in answer to Item 7(a) who may participate in the plan to be acted upon; (ii) all present directors and officers of the issuer as a group, if any director or officer may participate in the plan; and (iii) all employees, if employees may participate in the plan.

(e) If the plan to be acted upon can be amended otherwise than by a vote of stockholders, to increase the cost thereof to the issuer or to alter the allocation of the bene-

fits as between the groups specified in (b), state the nature of the amendments which can be so made.

Instructions. 1. The term "plan" as used in this item means any plan as defined in Instruction 1 to Item 7(b).

2. If action is to be taken with respect to the amendment or modification of an existing plan, the item shall be answered with respect to the plan as proposed to be amended or modified and shall indicate any material differences from the existing plan.

3. The following instructions shall apply to paragraph (d):

(a) Information need only be given with respect to benefits received or set aside within the past 5 years.

(b) Information need not be included as to payments made for, or benefits to be received from, group life or accident insurance, group hospitalization or similar group payments or benefits.

(c) If action is to be taken with respect to any plan in which directors or officers may participate, the information called for by Item 7(d) (1) and (2) shall be furnished for the last 5 fiscal years of the issuer and any period subsequent to the end of the latest such fiscal year, in aggregate amounts for the entire period for each such person and group. If any named person, or any other director or officer, purchased securities through the exercise of options during such period, state the aggregate amount of securities of that class sold during the period by such named person and by such named person and such other directors and officers as a group. The information called for by this Instruction 3(c) is in lieu of the information since the beginning of the issuer's last fiscal year called for by Item 7(d) (1) and (2). If employees may participate in the plan to be acted upon, state the aggregate amount of securities called for by all options granted to employees during the 5-year period and, if the options were other than "restricted" or "qualified" stock options or options granted pursuant to an "employee stock purchase plan", as the quoted terms are defined in sections 422 through 424 of the Internal Revenue Code, state that fact and the weighted average option price per share. The information called for by this instruction may be furnished in the form of the table illustrated in Appendix A (§ 240.14a-103). See Instruction 1 to Item 7(d).

4. If the plan to be acted upon is set forth in a written document, three copies thereof shall be filed with the Commission at the time preliminary copies of the proxy statement and form of proxy are filed pursuant to paragraph (a) of Rule 14a-6 (§ 240.14a-6).

Item 10. Pension and retirement plans. If action is to be taken with respect to any pension or retirement plan, furnish the following information:

(a) Describe briefly the material features of the plan, identify each class of persons who will be entitled to participate therein, indicate the approximate number of persons

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in each such class and state the basis of such participation.

(b) State (1) the approximate total amount necessary to fund the plan with respect to past services, the period over which such amount is to be paid and the estimated annual payments necessary to pay the total amount over such period, (2) the estimated annual payment to be made with respect to current services and (3) the amount of such annual payments to be made for the benefit of (i) directors and officers and (ii) employees.

(c) State (1) the name and position with the issuer of each person specified in Item 7(a) who will be entitled to participate in the plan, (2) the amount which would have been paid or set aside by the issuer and its subsidiaries for the benefit of such person for the last fiscal year of the issuer if the plan had been in effect, and (3) the amount of the annual benefits estimated to be payable to such person in the event of retirement at normal retirement date.

(d) Furnish such information, in addition to that required by this item and Item 7, as may be necessary to describe adequately the provisions already made pursuant to all bonus, profit sharing, pension, retirement, stock option, stock purchase, deferred compensation or other remuneration or incentive plans, now in effect or in effect within the past five years, for (i) each director or officer named in answer to Item 7(a) who may participate in the plan to be acted upon; (ii) all present directors and officers of the issuer as a group; (iii) any director or officer may participate in the plan, and (iii) all employees, if employees may participate in the plan.

(e) If the plan to be acted upon can be amended otherwise than by a vote of stockholders to increase the cost thereof to the issuer or alter the allocation of the benefits as between the groups specified in (b) (3), state the nature of the amendments which can be so made.

Instructions. 1. The term "plan" as used in this item means any plan as defined in Instruction 1 to Item 7(b). Instruction 2 to Item 9 shall apply to this item.

2. The information called for by paragraph (b) (3) or (c) (2) need not be given as to payments made on an actuarial basis pursuant to any group pension plan which provides for fixed benefits in the event of retirement at a specified age or after a specified number of years of service.

3. Instruction 3 to Item 9 shall apply to paragraph (d) of this item.

4. If the plan to be acted upon is set forth in a written document, three copies thereof shall be filed with the Commission at the time preliminary copies of the proxy statement and form of proxy are filed pursuant to paragraph (a) of Rule 13a-6 (17 CFR 240.13a-6).

Item 11. Options, warrants or rights. If action is to be taken with respect to the granting or extension of any options, war-

rants or rights to purchase securities of the issuer or any subsidiary, furnish the following information:

(a) State (i) the title and amount of securities called for or to be called for by such options, warrants or rights; (ii) the prices, expiration dates and other material conditions upon which the options, warrants or rights may be exercised; (iii) the consideration received or to be received by the issuer or subsidiary for the granting or extension of the options, warrants or rights; (iv) the market value of the securities called for or to be called for by the options, warrants or rights as of the latest practicable date, and (v) in the case of options, the Federal income tax consequences of the issuance and exercise of such options to the recipient and to the issuer.

(b) State separately the amount of options, warrants or rights received or to be received by the following persons, naming each such person: (i) each director or officer named in answer to Item 7(a); (ii) each nominee for election as a director of the issuer; (iii) each associate of such directors, officers or nominees and (iv) each other person who received or is to receive 5 percent or more of such options, warrants or rights. State also the total amount of such options, warrants or rights received or to be received by all directors and officers of the issuer as a group, without naming them.

(c) Furnish such information, in addition to that required by this item and Item 7, as may be necessary to describe adequately the provisions already made pursuant to all bonus, profit sharing, pension, retirement, stock option, stock purchase, deferred compensation, or other remuneration or incentive plans, now in effect or in effect within the past 5 years, for (i) each director or officer named in answer to Item 7(a) who may participate in the plan to be acted upon; (ii) all present directors and officers of the issuer as a group; (iii) any director or officer may participate in the plan, and (iv) all employees, if employees may participate in the plan.

Instructions. 1. The term "plan" as used in this item means any plan as defined in Instruction 1 to Item 7(b).

2. Paragraphs (b) and (c) do not apply to warrants or rights to be issued to security holders as such on a pro rata basis.

3. Instruction 3 to Item 9 shall apply to paragraph (c) of this item.

4. If the options described in answer to this item are issued pursuant to a plan which is set forth in a written document, three copies thereof shall be filed with the Commission at the time preliminary copies of the proxy statement and form of proxy are filed pursuant to paragraph (a) of § 240.13a-6.

Note: The Commission should be informed, as supplemental information, when the proxy statement in preliminary form is filed, as to when the options, warrants or rights and the shares called for thereby will be registered under the Securities Act of

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1933, or if such registration is not contemplated the section of the Act or rule of the Commission under which exemption from such registration is claimed and the facts relied upon to make the exemption available.

Item 12. Authorization or issuance of securities otherwise than for exchange. If action is to be taken with respect to the authorization or issuance of any securities otherwise than for exchange for outstanding securities of the issuer, furnish the following information:

(a) State the title and amount of securities to be authorized or issued.

(b) Furnish a description of the securities such as would be required to be furnished in an application on the appropriate form for their registration on a national securities exchange. If the terms of the securities cannot be stated or estimated with respect to any or all of the securities to be authorized, because no offering thereof is contemplated in the proximate future, and if no further authorization by security holders for the issuance thereof is to be obtained, it should be stated that the terms of the securities to be authorized, including dividend or interest rates, conversion prices, voting rights, redemption prices, maturity dates, and similar matters will be determined by the board of directors. If the securities are additional shares of common stock of a class outstanding, the description may be omitted except for a statement of the preemptive rights, if any. Where the statutory provisions with respect to preemptive rights are so indefinite or complex that they cannot be stated in summarized form, it will suffice to make a statement in the form of an opinion of counsel as to the existence and extent of such rights.

(c) Describe briefly the transaction in which the securities are to be issued, including a statement as to (1) the nature and approximate amount of consideration received or to be received by the issuer, and (2) the approximate amount devoted to each purpose so far as determinable for which the net proceeds have been or are to be used. If it is impracticable to describe the transaction in which the securities are to be issued, state the reason, indicate the purpose of the authorization of the securities, and state whether further authorization for the issuance of the securities by a vote of security holders will be solicited prior to such issuance.

(d) If the securities are to be issued otherwise than in a general public offering for cash, state the reasons for the proposed authorization or issuance and the general effect thereof upon the rights of existing security holders.

Item 13. Modification or exchange of securities. If action is to be taken with respect to the modification of any class of securities of the issuer, or the issuance or authorization for issuance of securities of the issuer in exchange for outstanding secu-

rities of the issuer, furnish the following information:

(a) If outstanding securities are to be modified, state the title and amount thereof. If securities are to be issued in exchange for outstanding securities, state the title and amount of securities to be so issued, the title and amount of outstanding securities to be exchanged therefor and the basis of the exchange.

(b) Describe any material differences between the outstanding securities and the modified or new securities in respect of any of the matters concerning which information would be required in the description of the securities in an application on the appropriate form for their registration on a national securities exchange.

(c) State the reasons for the proposed modification or exchange and the general effect thereof upon the rights of existing security holders.

(d) Furnish a brief statement as to arrears in dividends or as to defaults in principal or interest in respect to the outstanding securities which are to be modified or exchanged and such other information as may be appropriate in the particular case to disclose adequately the nature and effect of the proposed action.

(e) Outline briefly any other material features of the proposed modification or exchange. If the plan of proposed action is set forth in a written document, file copies thereof with the Commission in accordance with § 240.14a-6 (Rule X-14A-6).

Instruction. If the existing security is presently listed and registered on a national securities exchange, state whether it is intended to apply for listing and registration of the new or reclassified security on such exchange or any other exchange. If it is not intended to make such application, state the effect of the termination of such listing and registration.

Item 14. Mergers, consolidations, acquisitions and similar matters. (See Note A at the beginning of this section.) Furnish the following information if action is to be taken with respect to any plan for (i) the merger or consolidation of the issuer into or with any other person or of any other person into or with the issuer, (ii) the acquisition by the issuer or any of its security holders of securities of another issuer, (iii) the acquisition by the issuer of any other going business or of the assets thereof, (iv) the sale or other transfer of all or any substantial part of the assets of the issuer, or (v) the liquidation or dissolution of the issuer:

(a) Outline briefly the material features of the plan. State the reasons therefor and the general effect thereof upon the rights of existing security holders. If the plan is set forth in a written document, file three copies thereof with the Commission at the time preliminary copies of the proxy statement and form of proxy are filed pursuant to Rule 14a-6(a) (17 CFR 240.14a-6(a)).

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(b) Furnish the following information as to the issuer and each person which is to be merged into the issuer or into or with which the issuer is to be merged or consolidated or the business or assets of which are to be acquired or which is the issuer of securities to be acquired by the issuer in exchange for all or a substantial part of its assets or to be acquired by security holders of the issuer. What is required is information essential to an investor's appraisal of the action proposed to be taken.

(1) Describe briefly the business of such person. Information is to be given regarding pertinent matters such as the nature of the products or services, methods of production, markets, methods of distribution and the sources and supply of raw materials.

(2) State the location and describe the general character of the plants and other important physical properties of such person. The description is to be given from an economic and business standpoint, as distinguished from a legal standpoint.

(3) Furnish a brief statement as to dividends in arrears or defaults in principal or interest in respect of any securities of the issuer or of such person, and as to the effect of the plan thereon and such other information as may be appropriate in the particular case to disclose adequately the nature and effect of the proposed action.

(4) Furnish a tabulation in columnar form showing the existing and the pro forma capitalization.

(5) Furnish in columnar form for each of the last 5 fiscal years a historical summary of earnings and show per share amounts of net earnings, dividends declared for each year and book value per share at the end of the latest period.

(6) Furnish in columnar form for each of the last 5 fiscal years a combined pro forma summary of earnings, as appropriate in the circumstances, indicating the aggregate and per share earnings for each such year and the pro forma book value per share at the end of the latest period. If the transaction establishes a new basis of accounting for assets of any of the persons included therein, the pro forma summary of earnings shall be furnished only for the most recent fiscal year and interim period and shall reflect appropriate pro forma adjustments resulting from such new basis of accounting.

(7) To the extent material for the exercise of prudent judgment in regard to the matter to be acted upon, furnish the historical and pro forma earnings data specified in (5) and (6) above for interim periods of the current and prior fiscal years, if available.

Instructions. 1. The earnings per share and dividends per share amounts required by paragraphs (b) (5) and (6) shall be presented in tabular form where appropriate and equated to a common basis in exchange transactions.

2. Include comparable data for any additional fiscal years necessary to keep the summary from being misleading. Subject to

appropriate variation to conform to the nature of the business or the purpose of the offering, the following items shall be included: net sales or operating revenues; cost of goods sold or operating expenses (or gross profit); interest charges; income taxes; net income; special items, and net income and special items. The summary shall reflect the retroactive adjustment of any material items affecting the comparability of the results.

3. In connection with any unaudited summary for an interim period or periods between the end of the last fiscal year and the balance sheet date, and any comparable unaudited prior period, a statement shall be made that all adjustments necessary to a fair statement of the results for such interim period or periods have been included. In addition, there shall be furnished in such cases, as supplemental information but not as a part of the proxy statement, a letter describing in detail the nature and amount of any adjustments, other than normal recurring accruals, entering into the determination of the results shown.

4. Paragraph (b) shall not apply if the plan described in answer to paragraph (a) involves only the issuer and one or more of its totally held subsidiaries.

(c) As to each class of securities of the issuer, or of any person specified in paragraph (b), which is admitted to dealing on a national securities exchange or with respect to which a market otherwise exists, and which will be materially affected by the plan, state the high and low sale prices (or, in the absence of trading in a particular period, the range of the bid and asked prices) for each quarterly period within two years. This information may be omitted if the plan involves merely the liquidation or dissolution of the issuer.

Item 15. Financial statements.

(a) If action is to be taken with respect to any matter specified in Item 12, 13, or 14 above, furnish certified financial statements of the issuer and its subsidiaries such as would currently be required in an original application for the registration of securities of the issuer under the Act. All schedules other than the schedules of supplementary profit and loss information may be omitted.

Instructions. 1. Such statements shall be prepared and certified in accordance with Regulation S-X (Part 210 of this chapter). One copy of the definitive proxy statement filed with the Commission shall include a manually signed copy of the accountant's certificate.

2. Such statements may be omitted with respect to a plan described in answer to Item 14(a) if the plan involves only the issuer and one or more of its totally held subsidiaries.

(b) If action is to be taken with respect to any matter specified in Item 14(b), furnish for each person specified therein, other than the issuer, financial statements such as would currently be required in an original registration statement for registration

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of securities of such person pursuant to section 13 of the Act. Such statements shall be certified if practicable. Notwithstanding the foregoing, the following may be omitted: (1) All schedules other than schedules of supplementary profit and loss information; (2) statements for any totally held subsidiary of the issuer which is included in the consolidated statement of the issuer and its subsidiaries, and (3) statements for a person which is to succeed to the issuer, or to the issuer and one or more of its wholly held subsidiaries, provided the capital structure and balance sheet of the successor immediately after the succession will be substantially the same as those of the issuer or the combined capital structures and balance sheets of the issuer and its wholly held subsidiaries, as the case may be.

Instructions. 1. Such statements shall be prepared in accordance with Regulation S-X (Part 210 of this chapter) and, if certified, shall be certified in accordance with that regulation and one copy of the definitive proxy statement filed with the Commission shall include a manually signed copy of the accountant's certificate.

2. Instruction 2 to paragraph (a) shall apply to this paragraph.

(c) The Commission may, upon the request of the issuer, permit the omission of any of the statements herein required where such statements are not necessary for the exercise of prudent judgment in regard to any matter to be acted upon, or may permit the filing in substitution thereof of appropriate statements of comparable character. The Commission may also require the filing of other statements in addition to, or in substitution for, the statements herein required in any case where such statements are necessary or appropriate for an adequate presentation of the financial condition of any person whose financial statements are required, or whose statements are otherwise material for the exercise of prudent judgment in regard to any matter to be acted upon. In the usual case, financial statements are deemed material to the exercise of prudent judgment where the matter to be acted upon is the authorization or issuance of a material amount of senior securities, but are not deemed material where the matter to be acted upon is the authorization or issuance of common stock, otherwise than in an exchange, merger, consolidation, acquisition or similar transaction.

(d) The proxy statement may incorporate by reference any financial statements contained in an annual report sent to security holders pursuant to §240.144-3 (Rule X-144-3) with respect to the same meeting as that to which the proxy statement relates, provided such financial statements substantially meet the requirements of this item.

Item 16. Acquisition or disposition of property. If action is to be taken with respect to the acquisition or disposition of any property, furnish the following information:

(a) Describe briefly the general character and location of the property.

(b) State the nature and amount of consideration to be paid or received by the issuer or any subsidiary. To the extent practicable, outline briefly the facts bearing upon the question of the fairness of the consideration.

(c) State the name and address of the transferor or transferee, as the case may be, and the nature of any material relationship of such person to the issuer or any affiliate of the issuer.

(d) Outline briefly any other material features of the contract or transaction.

Item 17. Restatement of accounts. If action is to be taken with respect to the restatement of any asset, capital, or surplus account of the issuer, furnish the following information:

(a) State the nature of the restatement and the date as of which it is to be effective.

(b) Outline briefly the reasons for the restatement and for the selection of the particular effective date.

(c) State the name and amount of each account (including any reserve accounts) affected by the restatement and the effect of the restatement thereon. Tabular presentation of the amounts shall be made when appropriate, particularly in the case of recapitalizations.

(d) To the extent practicable, state whether and the extent, if any, to which, the restatement will, as of the date thereof, alter the amount available for distribution to the holders of equity securities.

Item 18. Action with respect to reports. If action is to be taken with respect to any report of the issuer or of its directors, officers or committees or any minutes of meeting of its stockholders, furnish the following information:

(a) State whether or not such action is to constitute approval or disapproval of any of the matters referred to in such reports or minutes.

(b) Identify each of such matters which it is intended will be approved or disapproved, and furnish the information required by the appropriate item or items of this schedule with respect to each such matter.

Item 19. Matters not required to be submitted. If action is to be taken with respect to any matter which is not required to be submitted to a vote of security holders, state the nature of such matter, the reasons for submitting it to a vote of security holders and what action is intended to be taken by the management in the event of a negative vote on the matter by the security holders.

Item 20. Amendment of charter, bylaws of other documents. (No change in the text of the item; the following new instruction is added to the item.)

Instruction. Where the matter to be acted upon is the classification of directors, state whether vacancies which occur during the

year may be filled by the board of directors to serve only until the next annual meeting or may be so filled for the remainder of the full term.

Item 21. Other proposed action. If action is to be taken with respect to any matter not specifically referred to above, describe briefly the substance of each such matter in substantially the same degree of detail as is required by Items 5 to 20, inclusive, above.

Item 22. Vote required for approval. As to each matter which is to be submitted to a vote of security holders, other than elections to office or the selection or approval of auditors, state the vote required for its approval.

(See 14, 49 Stat. 895; 15 U.S.C. 78a) [17 F.R. 11134, Dec. 18, 1952, as amended at 31 F.R. 213, Jan. 7, 1966; 31 F.R. 475, Jan. 14, 1966; 31 F.R. 2592, Feb. 10, 1966; 32 F.R. 20772, Dec. 23, 1967; 32 F.R. 26354, Dec. 29, 1967; 33 F.R. 2293, Feb. 15, 1968; 34 F.R. 7574, May 10, 1969; 35 F.R. 3660, Feb. 23, 1970. Redesignated, 30 F.R. 14046, Nov. 3, 1965]



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The Daily Record

October 15, 1975

Re: United State of America vs Lloyd Dixon, Jr.

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of
Lipsitz, Green, Fahringer, Roll, Schuller and James,
Mr. Herald Price Fahringer, Esq.

Attorney(s) for

Appellant

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

Robert Plaxico, Esq., Special Attorney
United States Department of Justice
P O Box 14236
Washington, D.C. 20044

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a
Post Office maintained by the United States Government in the City of Rochester, New York.

☐ By hand delivery

Sworn to before me this 15th day of October, 1975

Notary Public
Commissioner of Deeds